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IN THE

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1974

THE HEARST CORPORATION and its Divisions, LOS ANGELES HERALD-EXAMINER and HILLBRO NEWSPAPER PRINTING COMPANY,

Petitioners,

vs.

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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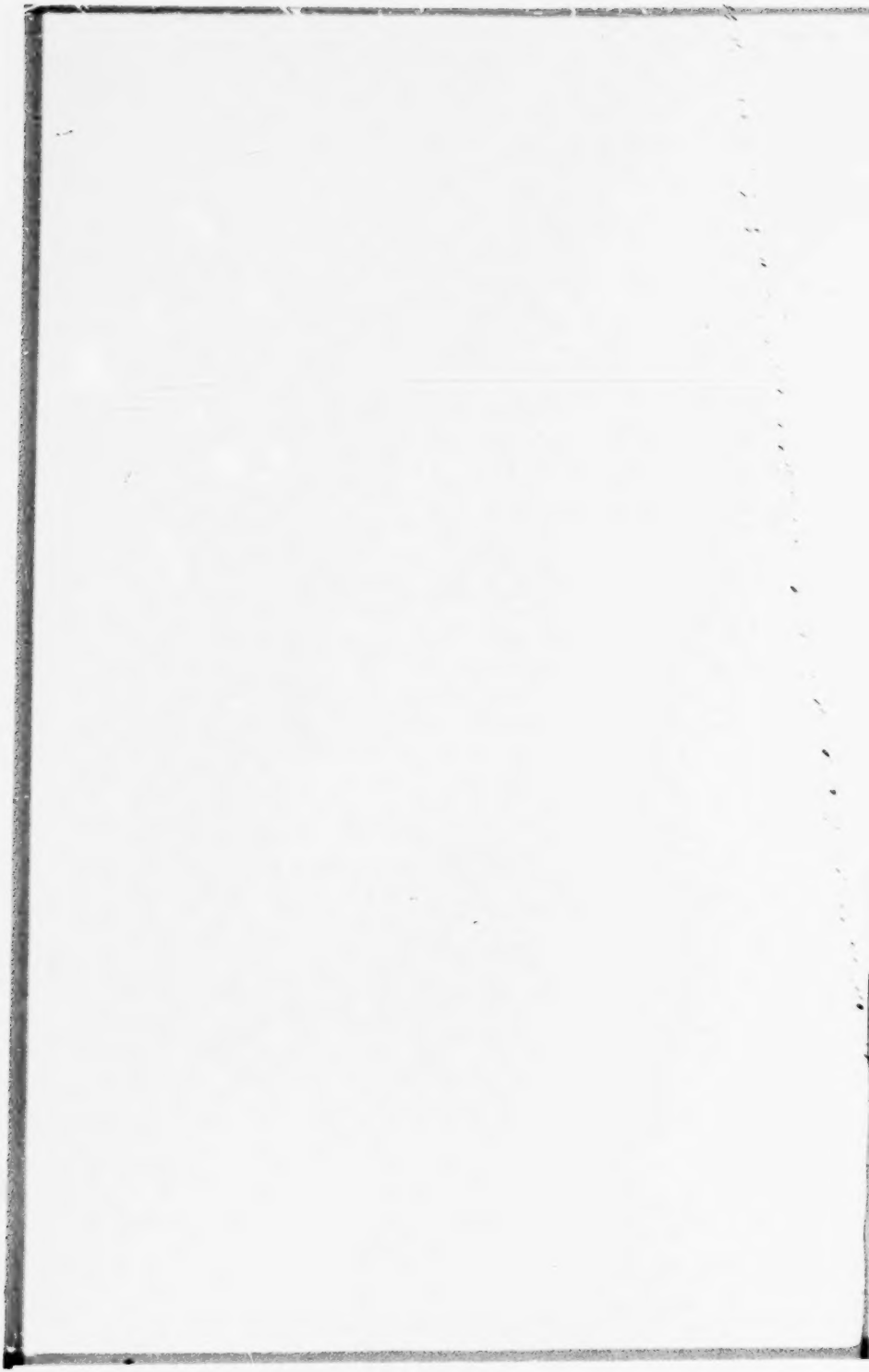

TOPICAL INDEX

	Page
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Preliminary Statement	3
Dispute Between the Parties	4
Decision and Award of the Arbitrator	6
Decision of the District Court	7
Decision of the Court of Appeals	8
Reasons for Granting the Writ	9
1. The Decision Below Conflicts in Principle With *John Wiley & Sons v. Livingston*, 376 U.S. 543, Which Holds That Procedural Defenses Are to Be Decided Exclusively by the Arbitrator	9
2. The Decision Below Conflicts in Principle With a Prior Decision of This Court and Directly Conflicts With Decisions of the Various Circuits Which Hold That an Arbitration Award May Not Be Vacated so Long as It Draws Its Essence From the Collective Bargaining Agreement	13
A. The Decision Below Conflicts in Principle With *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, Which Holds	

Page

That an Arbitration Award Disposing of the Merits of a Dispute May Not Be Vacated by a Court so Long as It Draws Its Essence From the Collective Bargaining Agreement 13

B. The Decision Below Is in Direct Conflict With Decisions of the Sixth and Seventh Circuits Which Hold That the *Enterprise* Standard of Limited Judicial Review Is Applicable to a Procedural Arbitration Award as Well as an Award Disposing of the Merits of a Dispute 17

C. The Decision Below Is in Direct Conflict With Decisions of the First, Third, Seventh, and Tenth Circuits Which Hold That an Award Draws Its Essence From the Collective Bargaining Agreement Even Though the Arbitrator Implies a Term Into the Agreement When Interpreting It 18

3. The Decision Below Frustrates the National Labor Policy of Favoring Arbitration as the Method for Settling Industrial Disputes Because It Nullifies Ex Parte Arbitration 22

Conclusion 25

INDEX TO APPENDICES

Page

Appendix A: Court of Appeals Opinion A-1

Appendix B: Order Denying Rehearing B-1

Appendix C: District Court Memorandum of Opinion and Order C-1

Appendix D: Arbitrator's Findings and Award D-1

Appendix E: Arbitration Clause From the Applicable Collective Bargaining Agreement E-1

Appendix F: Rossi v. Trans World Airlines, Inc. No. 73-1458 (9th Cir., Nov. 27, 1974) F-1

TABLE OF AUTHORITIES CITED

Cases	Page
Amalgamated Butcher Workmen Local 641 v. Capitol Packing Co., 413 F.2d 668 (10th Cir. 1969)	21
Boot Workers, Local 149 v. Faith Shoe Co., 201 F. Supp. 234 (M.D. Pa. 1962)	25
Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970)	10
Chambers v. Beaunit Corp., 404 F.2d 128 (6th Cir. 1968)	18
Department of Banking v. Pink, 317 U.S. 264 (1942)	2
F & M Schaefer Brewing Co. v. International Union of United Brewery Workers, Local 49, 420 F.2d 854 (2d Cir. 1970)	19
Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974)	10, 22
I.U.O.E. Local 150 v. Flair Builders, Inc., 406 U.S. 487 (1972)	10, 11, 12
I.U.E. v. Peerless Pressed Metals Corp., 489 F.2d 768 (1st Cir.) *cert. denied*, 414 U.S. 1022 (1973)	20, 23, 24
John Wiley & Sons v. Livingston, 376 U.S. 543 (1964)	6, 7, 8, 9, 10, 11, 12
Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969)	20, 21
Meat Cutters v. Penobscot Poultry Co., 200 F. Supp. 879 (D.C. Me. 1961)	25

Page

Peerless Pressed Metal Corp. v. I.U.E., 451 F.2d 19 (1st Cir. 1971) 19, 23

Rossi v. Trans World Airlines, Inc., No. 73-1458, (9th Cir. Nov. 27, 1974) 17

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 9

Torrington Co. v. Metal Products Workers Local 1645, 362 F.2d 677 (2d Cir. 1966) 19

United Rubber Workers, Local 135 v. Dunlop Tire & Rubber Corp., 391 F.2d 897 (2d Cir. 968).. 19

United States v. Healy, 376 U.S. 75 (1964) 2

United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960) 10, 22

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) .....10, 13 .....14, 16, 17, 18, 19, 22

United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) ..10, 22

Yellow Cab Co. v. Democratic Union Organizing Committee, Local 777, 398 F.2d 735 (7th Cir. 1968) 17, 21

Rules

Voluntary Labor Arbitration Rules of the American Arbitration Association, Rules 12, 13, 27, 43 Lab. Arb. 1292 23

Regulations

Code of Federal Regulations, Title 29, Sec. 1404.7 (a) 23

Code of Federal Regulations, Title 29, Sec. 1404.8 23

Statutes

Page

Labor Management Relations Act of 1947, Sec. 301(a) 3, 9

United States Code, Title 28, Sec. 1441(b) 3

Reference

Elkouri, F. & E. Elkouri, How Arbitration Works (3d Ed. 1973), pp. 205-08 25

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the vacation of a labor arbitration award.

OPINIONS BELOW

The opinion of the court of appeals, reported at .... F. 2d ...., 87 L.R.R.M. 2597, is set forth in Appendix A hereto. The order of the court of appeals denying the petition for a rehearing in banc is set forth in Appendix B hereto. The opinion and order of the

district court, reported at 352 F. Supp. 1383, is set forth in Appendix C hereto. The arbitrator's findings and award is set forth in Appendix D hereto.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1974, affirming the vacation of the arbitration award. The court of appeals denied a timely petition for rehearing on November 12, 1974. This petition is, therefore, timely. 28 U.S.C. § 2101(c). *See e.g., United States v. Healy,* 376 U.S. 75, 77-80 (1964); *Department of Banking v. Pink,* 317 U.S. 264, 266 (1942). The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and in accordance with Supreme Court Rule 19.

QUESTIONS PRESENTED

1. Is a procedural defense to arbitration to be decided by the court, and not the arbitrator, where the parties' collective bargaining agreement does not expressly authorize the arbitrator to decide the procedural defense?

2. May an arbitration award sustaining a procedural defense be vacated because the arbitrator implied a term into the collective bargaining agreement while interpreting an ambiguous provision?

3. Where one party contests the arbitrability of a dispute, are the provisions of the collective bargaining agreement and the rules of the American Arbitration Association providing for unilateral initiation of arbitration and for issuance of an ex parte award invalid and ineffective?

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Preliminary Statement.

The arbitration award at issue was rendered on August 12, 1970. (App. D.) The arbitrator ruled that certain grievances filed by Respondent were not arbitrable because of the failure of Respondent to cause the appointment of an arbitrator within a reasonable period of time. (App. D at 29.)

On November 18, 1970, Respondent filed a petition to vacate the award in the Superior Court of the State of California for the County of Los Angeles. On November 25, 1970, Petitioners removed the action to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1441(b), invoking the jurisdiction of the district court under Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a).

The district court vacated the award and ordered the parties again to utilize the grievance procedure pro-

vided in their collective bargaining agreements* and, failing amicable settlement, to arbitrate the merits. The court of appeals affirmed the vacatur, but modified the district court's order to require Petitioners directly to arbitrate the merits of the grievances, thus depriving Petitioners of any procedural defenses.

Dispute Between the Parties.

The parties' Agreement expired on November 18, 1967. The grievance and arbitration provisions, Article VII of the Agreement (set forth in Appendix E hereto), had required arbitration of "all grievances arising under this Agreement," and further provided that if the "party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator," the complaining party could have an arbitrator appointed unilaterally by the American Arbitration Association (hereinafter "AAA"), to whom the grievances would be submitted for "final decision." Article VII further specified that the AAA's voluntary labor arbitration rules providing for ex parte arbitration should govern. (App. E at 2.)

On March 27, 1968, Respondent filed its initial grievance under the expired Agreement.** It is undis-

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*There are two collective bargaining agreements; one each between Respondent and The Hearst Corporation's two divisions, the Los Angeles Herald-Examiner and the Hillbro Newspaper Printing Company. The agreements are identical in all respects relevant to this litigation. They are hereinafter collectively referred to as the "Agreement."

**This grievance involved certain employees' claims for payment of alternate benefits under Article XI of the expired Agreement. (App. D at 18.) Respondent subsequently filed additional grievances over dismissal pay under Article IV of the expired Agreement. (App. D at 16.) The foregoing grievances are hereinafter collectively referred to as "grievance."

puted that, if the Agreement were in effect, the grievance was timely filed.

On June 19 and August 5, 1968, Respondent demanded arbitration which Petitioners declined on the ground that the grievance both arose and was filed after the expiration of the Agreement. Over a year later, on August 13, 1969, Respondent again demanded arbitration which Petitioners again declined.

On October 3, 1969, 18 months after filing its initial grievance, Respondent finally exercised its unilateral right to have the AAA appoint an arbitrator, who, if necessary, would issue an ex parte award. Petitioners did not at any time cause or contribute to Respondent's 18-month delay, nor in fact was there anything Petitioners could do under the Agreement to preclude Respondent from timely submitting its grievance to ex parte arbitration. Indeed, Petitioners' explicit refusals to participate in an arbitration and its contention that the grievance was not arbitrable, rather than causing Respondent to delay for 18 months, instead immediately put Respondent on notice that if Respondent seriously wished to proceed to arbitration it should timely exercise its unilateral right to invoke the ex parte arbitration provisions of the Agreement. (App. D at 26-27.)

On October 8, 1969, the AAA appointed Thomas T. Roberts as arbitrator. Petitioners were then presented with a dilemma: Either participate in the arbitration, thereby waiving the right to later contend that the merits of the grievance were not arbitrable, or not appear, thereby risking under the AAA ex parte rule an adverse award which, notwithstanding Petitioners' contention, would probably be enforced. The

dilemma was further exacerbated because whatever the likelihood of prevailing on the merits, Petitioners believed that under the Agreement they had an excellent procedural defense to arbitration of the grievance because of Respondent's failure to cause the appointment of an arbitrator within a reasonable period of time. This procedural defense, under *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), Petitioners believed was solely for the arbitrator. A narrow exit from this dilemma was presented when Respondent agreed with the arbitrator's suggestion that the parties initially arbitrate the procedural issues, which they did. At the hearing, Petitioners stipulated that the Agreement was in effect, reserving their right to contend later that the merits of the grievance were not arbitrable.*

Decision and Award of the Arbitrator.

In his decision the arbitrator noted that submitted to him was "the narrow issue of whether or not [Respondent] sought the appointment of an arbitrator in a timely manner." (App. D at 22.) The arbitrator was aware that the "stakes" were high. However, under the Agreement he was bound to its provisions, one of which stated that " 'the time limits specified in this Article [VII] shall be observed unless amended, or extended, by mutual written agreement of the parties.' " (App. D at 23.) No extension had been agreed to in this case. After reviewing the time limits specified for each step of the grievance and arbitration procedure, he found that only the time for the unilateral appointment of an arbitrator by the complaining party was unspecified even though Petitioners had contended that it was clearly required within 60 days. However, he also

*During the hearing on February 3, 1970, the parties arranged subsequent dates for further hearings on the merits.

rejected Respondent's contention that the Agreement's silence on the point manifested the parties' intent to create a right which could be exercised by Respondent in perpetuity. Rather, the arbitrator considered the parties' practice during the Agreement's term of selecting an arbitrator for all grievances within 60 days of the demand for arbitration, interpreted the Agreement and concluded that the unilateral right to proceed to arbitration "constitutes an integral part of a carefully defined system which contemplates a timely movement of grievances to arbitration" and that this right must be exercised by the party desiring arbitration within a reasonable time. (App. D at 24.) The arbitrator then reviewed the facts of the case, found that, under the Agreement, Petitioners could not thwart the appointment of an arbitrator or the holding of an arbitration, and concluded that Respondent by delaying one and one half years did not exercise its right within a reasonable time. This ruling foreclosed an arbitration of the merits.

Decision of the District Court.

In vacating the arbitrator's award, the district court acknowledged that *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964), requires that the arbitrator, rather than the court, decide whether the procedural prerequisites to arbitration under the Agreement have been met. (App. C at 3.) This is what the arbitrator in fact did. But the court was concerned that, since arbitration was Respondent's exclusive remedy, failure to vacate the procedural award would deprive Respondent of any opportunity to litigate the merits of its grievance (App. C at 3-4), a result which regularly occurs whenever a court sustains a statute of limitations defense. To avoid this result, the court reasoned as follows:

Wiley prohibits "compulsory" arbitration absent a judicial determination of arbitrability; since the Agreement's provision for unilateral initiation of arbitration, is "compulsory," that provision may not be employed until a court determines that the arbitration provisions of the Agreement are in effect. Here the arbitration provisions were and are in effect; but that determination cannot now save the earlier arbitration award, which must therefore be vacated. The district court held that a prior judicial determination of arbitrability is a prerequisite to a valid ex parte arbitration award whenever arbitrability is challenged and ordered the parties to again process the grievance.

Decision of the Court of Appeals.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. Judge Moore,* writing for the panel, which included Judges Wright and Goodwin, affirmed the district court's vacation of the award, with the modification that Petitioners proceed directly to arbitrate the merits of the grievance, thus depriving Petitioners of any procedural defenses.

The court held in part, that despite the fact that the procedural defense of Respondent's unreasonable delay in causing his appointment was the issue submitted to the arbitrator, the award is of no effect because the procedural defense was not the grievance contemplated by the Agreement. (App. A at 12.) Thus, notwithstanding the fact that the proceeding before it was a petition to vacate an award rather than a petition to compel arbitration, the court broadly perceived a ju-

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*Senior United States Circuit Judge, United States Court of Appeals for the Second District, sitting by designation.

dicial responsibility "to oversee the arbitral process to ensure the parties receive the arbitration they bargained for." (App. A at 13.) The court concluded that the procedural defense was itself "a matter quite *dehors* the agreement" (App. A at 14) and therefore the arbitrator had no business deciding it, particularly where his decision precluded arbitration of the merits of the grievance—the only arbitration the court believes the parties "bargained for."

The court also held that even if the Petitioners' procedural defense were a "grievance" subject to arbitration under the Agreement, the instant award is a product of the arbitrator creating "a quasi statute of limitations not in the agreement," by construing the Agreement to imply a requirement that an arbitrator be appointed within a reasonable period of time. (App. A at 9.) The court, by ordering arbitration of the merits, decided the procedural defense de novo, contrary to the arbitrator.

Finally, the court approved the district court's conclusion that where arbitrability is contested unilateral arbitration is invalid and ineffective without a prior judicial determination of arbitrability. (App. A at 11.)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts in Principle With John Wiley & Sons v. Livingston, 376 U.S. 543, Which Holds That Procedural Defenses Are to Be Decided Exclusively by the Arbitrator.

In *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957) the Court held that Section 301(a) of the Labor Management Relations Act authorized federal courts to fashion a uniform body of federal common labor law. A vital part of this substantive law was then

set forth by the Court in the "*Steelworkers Trilogy*"* where the Court, in delineating the respective roles of judicial and arbitral authority in the private arbitration process, enunciated the national policy favoring arbitration for the settlement of disputes and concurrently limited the function of the courts. This policy favoring arbitration has been consistently reaffirmed. *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 377-80 (1974); *I.U.O.E. Local 150 v. Flair Builders, Inc.,* 406 U.S. 487 (1972); *Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970); *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964). Once it is determined the merits of a dispute are arbitrable, the role of the courts terminates. *John Wiley & Sons v. Livingston, supra.*

In *Wiley,* a petition to compel arbitration, the employer rejected the very existence of the collective bargaining agreement and the attendant contractual duty to arbitrate the grievances filed by the union. The employer also maintained that even if the subject matter of the grievances were arbitrable, the union, by its delay in seeking arbitration, had not complied with the procedural prerequisites to arbitration under the agreement. The Court held that the subject matter of the grievances was arbitrable and, more importantly, that the " 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator," not the courts. 376 U.S. at 557.

Unlike *Wiley,* the present case arose out of a petition to vacate an arbitration award and after the arbitrator's resolution of the procedural question foreclosed

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**United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

a decision on the merits. The court of appeals overturned that result and held that despite the fact that the merits of the grievance were and are arbitrable, the arbitrator could not decide the procedural defense because that issue was not the "grievance" for which arbitration was contemplated under the Agreement. (App. A at 12.) In reaching this conclusion, the decision made no mention and accordingly gave no consideration to *Wiley;* nor could it, because the principle enunciated in *Wiley* is directly in conflict with the court's reasoning.

This Court has never answered the often occurring specific question of whether it is the arbitrator, rather than a court, who decides the procedural defense of the timeliness of the resort to arbitration where in their collective bargaining agreement the parties have not expressly agreed to arbitrate that specific procedural defense, but have agreed to arbitrate the merits. Within the last three years the Court granted *certiorari* on this precise question in *I.U.O.E. Local 150 v. Flair Builders, Inc.,* 406 U.S. 487 (1972), but in deciding the case the Court expressly refrained from reaching the question. 406 U.S. at 490-91. In *Flair,* the Court held that where the collective bargaining agreement provided for arbitration of "any difference" between the parties, the parties *had* agreed to arbitrate the issue of whether the union's delay in seeking arbitration constituted laches barring arbitration and, therefore, the issue was for the arbitrator, not the courts. In the present case the court of appeals concluded that, unlike *Flair,* the language providing for arbitration of "all grievances arising under this Agreement" did not include an express agreement to arbitrate the procedural defense of Respondent's unreasonable delay and failure to comply with the time limitations of the Agreement.

Thus, the instant case squarely presents to the Court for the second time the important legal question presented but not decided in *Flair*. The undefined phrase "all grievances" in the parties' Agreement admittedly is not as broad as the language "any difference" interpreted by the Court in *Flair* as including an express agreement to arbitrate the issue of laches. Moreover, the grievance herein involved the payment of alternate benefits and dismissal pay to certain employees, and Petitioners' defense to arbitration of this grievance was that Respondent did not timely exercise its clear right to request the appointment of an arbitrator. This defense was not a "grievance" nor could it be construed as one since it dealt with an issue of procedural arbitrability which could arise only after the grievance was filed. The Agreement did not expressly state that the arbitrator determines procedural defenses to arbitration. However, since this procedural defense did "grow out of the dispute and bear[s] on its final disposition," the final disposition of this procedural defense "should [have been] left to the arbitrator" under this Court's ruling in *Wiley*. 376 U.S. at 557.

The court below not only negated the arbitrator's authority to decide the procedural defense, the court itself proceeded to decide it contrary to the arbitrator. This unwarranted extension of the judiciary's role into the arbitration process is erroneous and conflicts with the principle of law enunciated in *Wiley*. Furthermore, the question whether an arbitrator, and not a court, decides procedural defenses to arbitration where the collective bargaining agreement is silent, is an important federal question which has not been, but should be decided by this Court, as evidenced by the fact that *certiorari* was initially granted in *Flair* to decide this precise question.

2. The Decision Below Conflicts in Principle With a Prior Decision of This Court and Directly Conflicts With Decisions of the Various Circuits Which Hold That an Arbitration Award May Not Be Vacated so Long as It Draws Its Essence From the Collective Bargaining Agreement.

A. The Decision Below Conflicts in Principle With United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, Which Holds That an Arbitration Award Disposing of the Merits of a Dispute May Not Be Vacated by a Court so Long as It Draws Its Essence From the Collective Bargaining Agreement.

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the one *Trilogy* case involving a petition to enforce an award, the Court dealt specifically with the standard for judicial review of arbitration awards:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." 363 U.S. at 596.
>
> "...
>
> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." 363 U.S. at 599.

Thus, an arbitrator's award should not be vacated "*so long as it draws its essence from the collective bargaining agreement.*" 363 U.S. at 597.

The decision below, after noting Petitioners' argument that arbitration awards are subject to limited ju-

dicial review, rejects the argument, and concludes that the award is "quite unsupported by the facts" and "[t]he record discloses no facts upon which a claim of lack of timeliness can be sustained. . . ." (App. A at 12, 14.) This plenary judicial review is directly in conflict with the principle in *Enterprise*. In passing on the validity of the award the decision below does not even cite *Enterprise;* no attempt is made to try to reconcile the result reached within the *Enterprise* standard, nor could such an attempt be successful. Rather, the decision broadly perceives the court's duty as "oversee[ing] the arbitral process to ensure the parties receive the arbitration they bargained for" (App. A at 13), and under this banner proceeds to give a full fledged review to the award. Thus while no issue of fact relevant to a determination of Petitioners' procedural defense was in dispute, i.e., the conduct of the parties, their past practice, the terms of the Agreement, or Respondent's one and one half year's delay, the decision below rejects the arbitrator's determination and makes its own contrary determination.

The decision below not only fails to limit judicial inquiry to the basic question of whether the award "draws its essence" from the Agreement, but fails even to address this basic question. Instead, the decision, without considering the arbitrator's reasoning or the degree to which his award is based upon his interpretation of the Agreement, mischaracterizes the award as creating a statute of limitations not in the Agreement and twice states that the award is not supported by the facts. (App. A at 12, 14.)

The facts of this case, however, show that the arbitrator clearly articulated both his reasoning and his

interpretation of the Agreement, and the factual basis for his conclusions. (App. D at 22-29.) There is no dispute as to what the arbitrator did in this case. He expressly found that the Agreement was silent on the question of the time limit within which an arbitrator must be sought by the complaining party. Given this contractual silence, the arbitrator concluded that it was his duty to interpret the Agreement in light of its relevant provisions and the custom of the shop. (App. D at 24.) Accordingly, the arbitrator concluded that the parties intended to construct a contract procedure which would speedily move grievances to arbitration by allowing unilateral initiation of arbitration and ex parte arbitration, thus preventing one party from frustrating the arbitration process by refusing, on whatever grounds, to participate. Based upon his interpretation of both the language and the parties' intent, and given the Agreement's silence on the time period in which ex parte arbitration must be sought, the arbitrator proceeded to imply into the collective bargaining agreement the requirement that arbitration be sought within "a reasonable period of time."* (App. D at 25.) Thus, the arbitrator's opinion clearly supports the conclusion that his award was based upon—"draws its essence from"—the Agreement.

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*The arbitration proceeding can be summarized as follows. Respondent took the position that the event giving rise to the grievance was Petitioners' March 12, 1968, refusal to pay and that the written notice of the grievance required by Section 2 of Article VII (App. E) was satisfied by Respondent's letter of March 27, 1968. Section 3 requires that grievances raised under Section 2 must be resolved, dismissed or submitted to arbitration within 60 working days following receipt of the Section 2 notice. Respondent intentionally furnished its demand to arbitrate on June 19, 1968, exactly the 59th working day from March 27, 1968, the Section 2 notice of the grievance. According to Respondent's theory, it had complied with

(This footnote is continued on next page)

Contrary to the court below, the arbitrator on the facts before him found that Respondent, by its 18-month delay, did not act within a reasonable period of time. More importantly, and also directly contrary to the court below, the arbitrator expressly found that "*nothing* in the record lends the slightest support to the charge . . . that [Petitioners were] somehow guilty of 'thwarting' [Respondent's] desire to arbitrate, or that [Petitioners] otherwise contributed to the delay." (App. D at 27.) (Emphasis supplied.) Thus, the arbitrator, unlike the court, did precisely what he was entitled to do under *Enterprise*, and his award should not have been vacated.

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all the time limits of Article VII, and could thereafter unilaterally proceed to the selection of an arbitrator at its leisure or never.

Petitioners showed that during the two-year term of the Agreement for all of the grievances upon which Respondent demanded arbitration, an arbitrator was selected within 60 working days of the demand. (App. D at 25) Petitioners advanced several theories on why Respondent's actions had not complied with the time limits of Section 3, and alternatively, that if Section 3 set forth no time limits, the appointment of an arbitrator was required within a reasonable period of time.

The arbitrator in his award reviewed the Agreement and disagreed with Respondent's interpretation. Reading Section 3, he concluded that all of the language and time limits therein cannot be complied with or harmonized when one party files its demand for arbitration on the 59th working day as did Respondent. Thus, the arbitrator found it necessary to interpret that section based upon a reading of the entire Article VII and specifically upon the time limits created for all the other steps in the arbitration procedure. He noted that during the term of the Agreement, the past practice of the parties had in each and every grievance resulted in the selection of an arbitrator within 60 working days. Drawing all of these factors together and bringing to bear his experience with the "custom of the shop," he concluded that the selection of an arbitrator must be done in a reasonable period of time and that Respondent's 18-month delay was not reasonable. (App. D at 22-29.)

B. The Decision Below Is in Direct Conflict With Decisions of the Sixth and Seventh Circuits Which Hold That the Enterprise Standard of Limited Judicial Review Is Applicable to a Procedural Arbitration Award as Well as to an Award Disposing of the Merits of a Dispute.

The court below was faced with a *procedural* arbitration award which foreclosed arbitration of the merits of the grievance. Because the court gave plenary review to the arbitrator's award and vacated it without articulating any limitation on its scope of review, the decision must be read as holding that the *Enterprise* standard does not apply to procedural awards.* Thus, referring to the cases cited by both parties on the proper scope of judicial review, the court noted:

> "Most of them stand for the proposition that arbitration is to be favored for a solution of labor disputes as indeed it should be *if the subject matter of the disputes is put fairly before the arbitrator.*" (App. A at 14.) (Emphasis added.)

A holding that judicial review of procedural arbitration awards is unfettered by *Enterprise* is a radical departure from that decision without precedent in any circuit; it is, moreover, in direct conflict with decisions of the Sixth and Seventh Circuits.

In *Yellow Cab Co. v. Democratic Union Organizing Committee, Local 777,* 398 F.2d 735 (7th Cir. 1968),

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*This limitation on *Enterprise* was again suggested by the Ninth Circuit in *Rossi v. Trans World Airlines, Inc.,* No. 73-1458, ... F.2d .... (9th Cir. Nov. 27, 1974), decided only 15 days after the denial of a rehearing in the instant case. A copy of the decision is attached hereto as Appendix F. In upholding a labor arbitration award, the court in *Rossi, supra,* noted that when the arbitration board decided that the grievant's discharge was justified, "it decided his case on its merits, not on a procedural technicality. Therefore, so long as that decision was based on [the parties'] agreement, it is not subject to our review." (App. F at 2.) Judge Goodwin, who was on the panel in *Rossi* was also on the panel in the instant case.

the Seventh Circuit held without equivocation that an arbitrator's resolution of the procedural defense of timeliness "is subject to the limited standard of review annunciated in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*" 398 F.2d at 737.

To the same effect was the Sixth Circuit's decision in *Chambers v. Beaunit Corp.*, 404 F.2d 128 (6th Cir. 1968). In *Chambers*, arbitration on the merits was foreclosed by an arbitral decision sustaining the procedural defense that the grievance had not been timely filed. The court, refusing to give plenary review to the procedural award, cited and applied the *Enterprise* standard:

> "Only in those limited instances in which the arbitrator exceeds the authority granted him and makes an award which does not '[draw] its essence from the collective bargaining agreement' may a court refuse enforcement of the award." 404 F.2d at 131.

The Ninth Circuit's plenary judicial review of the procedural arbitration award in the present case is in direct conflict with the above decisions of the Sixth and Seventh Circuits which correctly apply the *Enterprise* standard of limited judicial review to arbitration awards resolving procedural questions of timeliness.

C. The Decision Below Is in Direct Conflict With Decisions of the First, Third, Seventh, and Tenth Circuits Which Hold That an Award Draws Its Essence From the Collective Bargaining Agreement Even Though the Arbitrator Implies a Term Into the Agreement When Interpreting It.

The decision below affirms the vacation of the arbitrator's award because the arbitrator, in interpreting the Agreement as requiring the complaining party to seek the appointment of an arbitrator within a reason-

able time, created "a quasi-statute of limitations not in the agreement" (App. A at 9) and because the procedural defense he decided was itself "a matter quite *dehors* the agreement." (App. A at 14.) Even if the decision can be read as purporting to apply a standard of limited judicial review, the decision amounts to a ruling that an award cannot "[draw] its essence from the collective bargaining agreement" within the meaning of *Enterprise* where the arbitrator implies a term into the agreement.

Only the Second Circuit has held that an arbitration award should be vacated if the arbitrator, when construing the agreement, implies a term into it, *Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677 (2d Cir. 1966), and *Torrington* itself is of doubtful continued validity in the Second Circuit. *F & M Schaefer Brewing Co. v. International Union of United Brewery Workers, Local 49*, 420 F.2d 854, 856 (2d Cir. 1970); *United Rubber Workers, Local 135 v. Dunlop Tire & Rubber Corp.*, 391 F.2d 897, 900 (2d Cir. 1968).*

Moreover, in *Peerless Pressed Metal Corp. v. I.U.E.*, 451 F.2d 19 (1st Cir. 1971), the company sought to enjoin arbitration of the question whether a laid off supervisor with prior seniority in the bargaining unit retained such seniority for purposes of reinstatement in the bargaining unit. The parties' agreement expressly included "employees" and excluded "supervisors" from its coverage. Arbitration was ordered because an arbitrator could imply the term that for purposes of seniority a "supervisor" was an "employee." In the subse-

*Judge Moore, the author of the decision below in the present case, separately concurred in *United Rubber Workers, Local 135 v. Dunlop Tire & Rubber Corp.*, 391 F.2d 897 (2d Cir. 1968), and felt compelled to cite *Torrington* and assert that its principle remained valid. 391 F.2d at 900.

quent arbitration the arbitrator so found. The company then petitioned to vacate the award claiming that the arbitrator had exceeded his authority by going beyond the express terms of the agreement. The First Circuit upheld the award. *I.U.E. v. Peerless Pressed Metals Corp.*, 489 F.2d 768 (1st Cir.) *cert. denied*, 414 U.S. 1022 (1973).

Similarly, in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969), only two employees bid for a promotion. Under the express terms of the collective bargaining agreement both employees were clearly ineligible to bid for the promotion. The company promoted the less senior employee. The agreement was silent as to whom, between two ineligible bidders, a promotion should be awarded. The arbitrator referred to other portions of the agreement, particularly the seniority provisions, which were not expressly made applicable to the factual situation presented, in order to ascertain the parties' intent. He gave effect to that intent in his award by sustaining the grievance and ordering the company to promote the more senior employee. The Third Circuit enforced the award, stating:

> "[W]e hold that a labor arbitrator's award *does* 'draw its essence from the collective bargaining agreement' *if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention;* only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award." 405 F.2d at 1128. (Emphasis supplied.)

In the present case, the manner in which the arbitrator interpreted the parties' Agreement is identical to that in *Ludwig*. Thus, while the Agreement was silent, the arbitrator referred to other relevant portions of the Agreement to ascertain the intent of the parties and, as in *Ludwig*, "his interpretation gave a reasonable and effective meaning to the manifestations of the intention of the parties considered against the backdrop of practices of industry and the shop." 405 F.2d at 1133.

In *Yellow Cab Co. v. Democratic Union Organizing Committee, Local 777*, 398 F.2d 735 (7th Cir. 1968), the company contended that the union had not complied with the contractual requirement that grievances be submitted in writing and requests for arbitration be submitted within 20 days after the company's adverse decision on a grievance. The arbitrator interpreted the agreement to imply the requirement that the 20 days limitations period be measured from the date of the last discussion of the grievance with the union, and not from the date of the company's adverse decision. The Seventh Circuit enforced the award.

In *Amalgamated Butcher Workmen Local 641 v. Capitol Packing Co.*, 413 F.2d 668 (10th Cir. 1969), the Tenth Circuit enforced an arbitrator's award which implied a term requiring the employer to pay pro rata vacation pay upon a plant closure despite the fact that the parties agreed not to include, and did not include, the pro rata vacation pay provision of their previous contract in their present contract.

The result of the decision below is that parties will be presented with the impossible task of specifying in precise detail in their collective bargaining agreements

each and every contingency, foreseen or unforeseen, that might arise during an agreement's term. The decision so restricts arbitrators in performing their function of construing collective bargaining agreements that the only "disputes" for which an award is safe from judicial vacation are those for which the contractual language provides a clear resolution. However, where the language is that clear, "disputes" hardly will ever reach arbitration. Rather, it is precisely in the resolution of the inevitable ambiguities and unforeseen contingencies that the arbitrator plays a crucial and important role. See *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 378 (1974). The ruling below is erroneous and conflicts directly with the foregoing cases which have permitted arbitrators, through interpretation, to imply a provision into a collective bargaining agreement.

3. The Decision Below Frustrates the National Labor Policy of Favoring Arbitration as the Method for Settling Industrial Disputes Because It Nullifies Ex Parte Arbitration.

In accordance with the principles of the *Steelworkers Trilogy** and its progeny favoring arbitration as the most inexpensive and expeditious procedure for the resolution of industrial disputes, private parties have advanced this national labor policy by providing for ex parte arbitration. Many collective bargaining agreements incorporate by reference the *Voluntary Labor Arbitration Rules of the American Arbitration Associa-*

**United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). See also, *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 377-80 (1974).

tion or the Federal Mediation and Conciliation Service regulations relating to arbitration procedures, both of which provide for ex parte arbitration.*

The most frequent reason a party refuses to arbitrate is his belief that the particular claim is not substantively arbitrable—i.e., he never agreed to arbitrate it. Absent ex parte arbitration provisions, a complainant when faced with this assertion, must obtain a court order compelling arbitration. This procedure necessarily delays the arbitral process. On the other hand, where there are contractual provisions for ex parte arbitration, it is the recalcitrant party who has the burden of choosing a course of action; either participate in the arbitration, raising whatever defense, procedural or otherwise he might have, or not participate. If the arbitrator's award is favorable to the recalcitrant party the matter would in most cases end. If it is not favorable, a court would still be able subsequently to determine whether the matter was substantively arbitrable. Thus, the complainant receives his desired quick and relatively inexpensive arbitral decision, while a judicial determination of arbitrarily results only when absolutely necessary after the award has been rendered. Moreover, in this single judicial proceeding, both substantive arbitrability and the validity of the award under the *Enterprise* standard could be determined whereas two judicial proceedings, a petition to compel and a petition to vacate or enforce, ordinarily would have resulted. *See, e.g., Peerless Pressed Metals Corp. v. I.U.E.*, 451 F.2d 19 (1st Cir. 1971) (petition to compel) and *I.U.E. v. Peerless Pressed Metals Corp.*, 489 F.2d 768 (1st

**Voluntary Labor Arbitration Rules of the American Arbitration Association*, Rules 12, 13 and 27, *cited in* 43 Lab. Arb. 1292, 93-94; Federal Mediation and Conciliation Service regulations, 29 C.F.R. §§ 1404.7(a) and 1404.8.

Cir.), *cert. denied,* 414 U.S. 1022 (1973) (petition to vacate).

The decision below cannot be limited to the facts of this case. Rather, the decision nullifies ex parte arbitration provisions in every case where one party contests arbitrability—the most often occurring case and the one where the parties most intended such provisions to apply. Thus, the district court below held:

> "Since Hearst contended that the subject matter of the underlying dispute was not properly arbitrable, until that issue was resolved either judicially or by mutual agreement, the Guild was precluded from unilateral initiation of arbitration pursuant to Article VII § 3(b) of the collective bargaining agreements. As the language of *Wiley* suggests, the duty to arbitrate is created by contractual agreement. Hearst's position was that it had no duty to arbitrate under the collective bargaining agreements with the Guild. If no contractual duty to arbitrate exists, then provisions for unilateral initiation of arbitration are meaningless. Hearst could not have been forced by the unilateral initiation provisions to arbitrate that which it had no contractual duty to arbitrate." (App. C at 6.)

The court of appeals expressly affirmed this holding. (App. A at 11.)

The result of the decision below is that a prior judicial determination of arbitrability is a prerequisite to a valid ex parte arbitration award whenever arbitrability is challenged, no matter which party ultimately prevails. The decision below is wrong as a matter of policy because it nullifies the ex parte arbitration award

procedure thereby eliminating its salutary effects on the parties and on the private arbitration process of encouraging the parties to arbitrate.* Unless reversed, the decision below inevitably will result in the filing of far more petitions to compel arbitration in order to assure an award's validity. Those parties having grievances whose collective bargaining agreements now provide for ex parte arbitration, and who desire a valid award, will refuse to use those provisions whenever arbitrability is challenged, and accordingly will file petitions to compel arbitration. This result is contrary to the parties' intent and frustrates the national policy favoring arbitration.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 6, 1975

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*See *Meat Cutters v. Penobscot Poultry Co.*, 200 F. Supp. 879 (D.C. Me. 1961) (Gignoux, J.). See also, *Boot Workers, Local 149 v. Faith Shoe Co.*, 201 F. Supp. 234 (M.D. Pa. 1962); F. Elkouri & E. Elkouri, *How Arbitration Works*, 205-08 (3d Ed. 1973).

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE MATTER OF ARBITRATION BETWEEN LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, *Petitioner-Appellee,*	)	
vs.	)	No. 73-1742
THE HEARST CORPORATION, a corporation, Los Angeles Herald-Examiner, a Division of The Hearst Corporation, and Hillbro Newspaper Printing Company, a Division of The Hearst Corporation, *Respondents-Appellants.*	)	OPINION
LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, et al., *Plaintiffs-Appellants,*	)	
vs.	)	No. 73-1838
THE HEARST CORPORATION, a corporation, *Defendant-Appellee.*	)	

[October 4, 1974]

Appeal from the United States District Court for the Central District of California

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Before: MOORE,* WRIGHT and GOODWIN, Circuit Judges.

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*The Honorable Leonard P. Moore, Senior United States Circuit Judge, United States Court of Appeals for the Second District, sitting by designation.

MOORE, Circuit Judge:

Two appeals are presently before us. They involve the same subject matter, they arise out of the same facts and the opinions were written and judgments were directed to be entered by the same district judge (Hon. Robert J. Kelleher). The appeals will be considered and decided together.

The parties in "IN THE MATTER OF ARBITRATION BETWEEN LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, Petitioner-Appellee v. THE HEARST CORPORATION, a corporation, Los Angeles Herald-Examiner, a Division of The Hearst Corporation, and Hillbro Newspaper Printing Company, a Division of The Hearst Corporation, Respondents-Appellants" (No. 73-1742) are a group of employees of The Hearst Corporation or their beneficiaries represented collectively by Petitioner-Appellee, which will hereinafter be referred to as the "Guild." The Hearst Corporation, Respondents-Appellants, and its Divisions, publish, print and circulate a daily and Sunday newspaper, THE HERALD-EXAMINER, and will be referred to hereinafter as "Hearst."

The parties in "LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, et al., Plaintiffs-Appellants v. THE HEARST CORPORATION, a corporation, Defendant-Appellee" (No. 73-1838) are likewise the Guild and Hearst.

The controversies stem from the rights, if any, of Hearst and the Hearst employees under two collective

bargaining agreements, which had been entered into on or about January 28, 1966, by the Guild on behalf of the Hearst employees and Hearst. The agreements provided for wages, hours, working conditions, etc., covering the employees' employment. These agreements were but a continuation of similar employment agreements, containing comparable benefits, under which many of the employees had worked for a substantial number of years.

Two provisions of the agreement relating to compensation are critical to any decision adjudicating the employees' rights thereunder. Article XI, entitled "Alternate Benefits" declared that an employee, upon reaching the age of sixty-five (65), or upon the completion of twenty-five (25) years of service, would become entitled to receive from Hearst a cash lump sum payment based upon the numbers of years of his service to Hearst in accordance with a certain schedule set forth therein. To receive these payments, the employees, so desiring them, had to tender their resignations and request payment. Article IV, entitled "Dismissal Pay" (somewhat of a misnomer) provided for a cash lump sum payment to the beneficiary of any employee who died after more than six (6) months of service, the amount to be dependent on the period of service as set forth in a schedule in said Article.

No ambiguity is to be found in the terms of these Articles or in the prerequisites necessary to obtain the agreed-upon payments. To Hearst and the employees they were as much a part of wages as the weekly or monthly stipend. The following facts had to be shown for entitlement under Article XI. (1) age sixty-five

years (65) or over or twenty-years (25) years or more of service, (2) resignation tender, and (3) request for payment; under Article IV, two facts (1) death and (2) six (6) months or more of service. Just at there is no ambiguity in terms, there should be no ambiguity as to performance. However, commencing in the Fall of 1967, a series of events caused this otherwise stable situation to suddenly be turned into a controversy which in bitterness and duration bids fair to rivalling the War of the Roses. For some seven years the war has raged but thus far only in a series of legal skirmishes, none of which has attacked the main issue, i.e., the rights, if any, of the employees and Hearst under the agreements. It may seem quite incongruous after seven years for the courts now to say that it is high time to resolve this issue expeditiously and with finality but since courts have been created for this purpose they should so act when the issue is presented in proper form.

A few background facts will suffice. In September 1967 the Guild notified Hearst and state and federal mediation services that it intended to terminate or modify the existing agreements which expired on December 15, 1967. In October 1967 negotiations for a new agreement[1] commenced. As of yet, however, no settlement has been reached. No agreement having been reached by December 15, 1967, the Guild called a strike against Hearst, which has continued to date. However, the last seven years have not been uneventful for Hearst and the Guild.

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[1]Reference is occasionally made to "agreement" and to "agreements." Those words apply to the agreement which existed between Hearst, its employees and the Guild, covering the employees' employment and Hearst's obligations to them, and which defines the rights of the parties now before this Court.

Subsequent to December 15, 1967, employees who had reached the age of sixty-five (65) or had completed twenty-five (25) years of service, tendered their resignations and requested the payments specified in the agreements, the beneficiaries of deceased employees also requested the provided-for payments. To these requests Hearst replied that the agreements were no longer in effect and accordingly rejected them, and refused to make the specified payments. Then followed a protracted series of meetings between Hearst and the Guild to discuss the matter with Hearst remaining adamant in its position that the agreements no longer applied.

At this stage must be discussed Article VII of the agreements which provides for amicable settlement (a hoped-for desideratum) of "all grievances arising under this Agreement" (Article VII, SECTION 1). For this purpose, Grievance Committees were to be established by both the Guild and Hearst, certain formalities for the submission of grievances were set forth and in the event that arbitration was requested "the parties shall meet to select an arbitrator to whom the grievance of the complaining party shall be submitted for final decision." (Article VII, Section 3A).

Of particular significance to the litigations before us is the following paragraph:

> B. If such an arbitrator is not selected, or the party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator, or if for any other reason an arbitrator is not selected or secured within the aforesaid five (5) day period, then the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an

arbitrator pursuant to the present rules of the voluntary labor arbitration tribunal of the American Arbitration Association, and the grievance shall be submitted to such arbitrator for final decision.

Although meetings between the Guild and Hearst were held during the Spring of 1968, Hearst did not alter its position that the agreements were not in effect. Finally, on June 19, 1968, the Guild by letter demanded arbitration "of the grievances raised by its letter of March 27, 1968, relating to Hearst's refusal to pay alternate benefits" and requested by letter a meeting to select an arbitrator. This demand for arbitration was rejected by Hearst on the specific ground "that it arises out of events subsequent to the expiration of the Guild's collective bargaining agreement . . ." Thereafter, the Guild continued to submit grievances because of Hearst's refusal to pay and continued to demand arbitration. Hearst's rejection of both demands was based upon the same grounds above specified.

At this point must be mentioned a diversionary maneuver in which the employees and the Guild engaged. Apparently feeling thwarted in their efforts to obtain payments from Hearst, they turned to the State Labor Commissioner, Division of Labor Law Enforcement of the State of California, by assigning to the State for collection their claims against Hearst. Hearings on the claims were held in the Fall and Winter of 1968 at which Hearst maintained its position that the agreements were no longer in effect.

The Commissioner found that Hearst owed the sums claimed and demanded payment of Hearst. Unable to collect from Hearst, the Commissioner attempted to

file a criminal complaint against Hearst through the City Attorney of Los Angeles. The City Attorney refused to issue a criminal complaint because a contract issue was involved, and the Labor Commissioner, asserting that the claimants had a contract remedy through arbitration, refused to pursue a civil action. Thus, more than six months of time were wasted, and the claimants were still without their benefits.

All during this period (1968-1969) negotiations (so-called) were taking place between Hearst and the Guild, at which the Guild demanded payment and arbitration and Hearst rejected both.

Suspicious that the Guild might request *ex parte* arbitration, Hearst in writing warned the American Arbitration Association (AAA) that there was no agreement in effect and that any request to appoint an arbitrator would be invalid.

Meetings, however, continued to the end of August 1969 without tangible results. Finally, on October 3, 1969, the Guild by letter requested the appointment of an arbitrator pursuant to AAA rules. In disregard of, and in non-compliance with, its own rules, the AAA on or about October 8, 1969, appointed Thomas T. Roberts as the Arbitrator. The Arbitrator advised the Guild and Hearst that on February 3, 1970, he would hold a hearing which would relate in particular "to the viability of the grievance, the propriety of arbitration, the procedure to be followed if there is to be an arbitration and, of course, my jurisdiction."

The Arbitrator so circumscribed his role as to make the proceeding before him a legal nullity. Thus, in his initial letter to the parties he wrote: "It should be clear that any appearance before me on February 3,

1970, will be in the nature of a 'special appearance.' More specifically, any appearance on that date will not constitute a recognition of my jurisdiction nor will it be deemed a waiver of available defenses relating to a lack of arbitrability."

Hearst, to be doubly sure that its physical presence at any hearing would not be a waiver of its position that the matter was not arbitrable, specifically stated by letter that its participation "should not be considered as a general appearance, special appearance, nor a recognition of your jurisdiction; . . ." Furthermore, Hearst stated that its "involvement in this arbitration should not be construed as a relinquishment of its right and intention to proceed before any appropriate tribunal to vindicate its position that this matter is not arbitrable."

At the hearing itself on February 3, 1970, Hearst reiterated this position and added the ground that the matter was not arbitrable because the Guild had not made a timely request for the appointment of an arbitrator. To this statement the Arbitrator responded "that the Guild [should] understand that if we go forward this morning regarding anything that the company [Hearst] is not making a special appearance, a general appearance or a half-way between appearance." At this and the only hearing, the issue was restricted to the timeliness of the Guild's request for the appointment of an arbitrator. No testimony was presented as to the merits of the employees' claims.

On August 12, 1970, the Arbitrator rendered Findings and Award. He addressed himself to none of the claims or grievances filed by the employees except as he said that the grievances filed under the January 28,

1966 agreement were "not arbitrable because of the failure of the Guild to cause the appointment of an arbitrator in a timely manner as required by Article VII of the said agreement." Thus, he challenged, *sua sponte*, his own appointment by the AAA and, by creating a quasi statute of limitations not in the agreement, decided that the grievances were not arbitrable —in other words, he rejected his jurisdiction to pass upon the asserted grievances.

Frustrated by the California Labor Commission to obtain such benefits to which they may be entitled under the agreement and by the holding of the Arbitrator that their claims were not arbitrable, the beneficiaries under the agreements turned to the courts for relief.

On November 18, 1970, the Guild filed a petition to vacate the so-called Arbitrator's award. The Guild also filed an action against Hearst in the district court for breach of contract, unpaid wages, work and labor performed, money had and received and for certain declaratory relief.

Both actions came on for trial and decision before the Honorable Robert J. Kelleher, *Judge*. Decisions in each action were rendered under date of January 10, 1973. From the decision (Appeal No. 73-1742) vacating the so-called arbitration award and directing that arbitration proceed on the merits, Hearst appeals. From the decision (Appeal No. 73-1838) dismissing the breach of contract, etc., action on the ground that arbitration is the exclusive remedy under the agreement, the Guild appeals. These appeals will be considered on a composite basis because it would seem that together they present all questions of law and fact pertinent to a resolution of the respective rights of the parties.

So many questions of law and fact have been raised that some sifting analysis may well be made at the outset. The primary and initial question to be solved is: is the agreement in effect so as to control the rights of the parties thereto and, if in effect, what are those rights? Hearst claims that it is not and that it ceased to be operative either after its expiry date or because of the Guild's strike on December 15, 1967. The Guild, in turn, claims that the agreement was a wage contract; that the rights of the employees to the payments therein provided for became vested; and that these were not destroyed by the failure to negotiate a new contract or by strike. Subsidiary to this question is whether there is a difference between employees whose rights ripened on or before December 15, 1967, and those whose rights ripened thereafter. But all important is *who* is to determine whether the agreement was in effect so as to create these rights because, if there be no enforceable agreement, no rights substantive or procedural flow therefrom. The choice would appear to be limited to the courts, an arbitrator or possibly both.

The issue is not without its complexities. As the District Court pointed out in its opinion (Arbitration vacatur case) "Hearst did '. . . not intend to relinquish its rights to have this question of arbitrability resolved in any appropriate court tribunal.' " (Arbitration Proceedings' Transcript at 7.) The Court also referred to a pre-trial statement by Hearst's counsel that first, the Court had "to find that the basic underlying dispute is arbitrable. That is the duty of the Court." (Tr. Oct. 21, 1971, at 88). Although this comment may be somewhat ambiguous, i.e., is the agreement in effect and operative and is the dispute arbitrable thereunder, it is clarified by the Court's making a "judicial determina-

tion" and adjudging that "The contract between the parties, so far as it provides for amicable settlement or arbitration of disputes, is in full force and effect." and that "the grievances initiated by the Guild, based on Articles IV and XI of the collective bargaining agreements are properly arbitrable under those agreements;." The Court kept open the opportunity for amicable settlement by ordering that the Guild and Hearst "proceed to adjust their dispute as provided in Article VII of their agreements." However, if such a settlement were not reached as contemplated in sections 1 and 2 of said Article, "the parties shall have the right to proceed to have arbitrated the merits of the disputes as provided in section 3 of Article VII of their agreement."

The Conclusions of Law give direction to the judgment. The Court concluded that "the existence of an agreement to arbitrate a particular dispute is a matter for the Courts to decide"; that Hearst had not relinquished its right to have this issue judicially determined; that the issue of substantive arbitrability not having been determined, the Guild was precluded from unilateral initiation of arbitration; that the Arbitrator's award on procedural issues was of no effect and should be vacated. Of particular importance are the conclusions that the agreements are in full force and effect; that the grievance and arbitration provisions "cover the alternate benefits and dismissal pay disputes" and that Hearst is bound to resolve the grievances in the manner provided by the agreements; and that the parties must proceed to adjust their dispute as provided in Article VII. A judgment to this effect was ordered.

The Court, thus, clearly answered the question: was the agreement in effect. Obviously in its opinion neither

expiry date nor strike had destroyed its contractual obligations. All that remains is to determine the respective rights of the parties thereto.

On appeal (the award vacatur appeal) Hearst argues in substance that the Guild, by appearing before the Arbitrator on February 3, 1970, and litigating the procedural issue of timeliness in seeking arbitration, is bound by the award which is subject to only a limited judicial review which review does not include examining the Arbitrator's determination that the Guild delayed unreasonably in appealing to the AAA and that the Arbitrator could decide *sua sponte* whether he could limit himself solely to the issue of the propriety of his appointment.

Our function on appeal is to pass upon alleged errors in the District Court's opinions. Vacatur of the so-called award is the ultimate issue in No. 73-1742.

The award should be vacated. The parties made their agreement under which the Guild employees worked and Hearst received the benefits of their services. The employees' rights under Articles XI and IV were an important part of their contract. For over two years Hearst rejected all demands for recognition of the employees' claims and for arbitration on the theory that no agreement was in effect. Nevertheless negotiations of sorts were continuing during that period. When finally on October 3, 1970, the Guild was driven to seek unilateral arbitration, the AAA in non-conformity with its own rules appointed Arbitrator Roberts. The record discloses no facts upon which a claim of lack of timeliness can be sustained even if this had been the grievance contemplated by the agreement. All during this period it was Hearst and not the Guild which refused to recognize any duty to arbitrate.

We turn now to the Guild's action for breach of contract, etc. (Appeal No. 73-1838). The District Court dismissed this action "[s]ince arbitration is the exclusive remedy, an action for damages in breach of contract will not lie." The Court relied on the so-called trilogy[2] as enunciating a national policy of settling labor disputes by arbitration. On this appeal Hearst, despite its repeated proclamations that no agreement was in effect, supports the District Court's position that the Guild's sole remedy is through "the Arbitral Process Provided for by the Collective Bargaining Agreement." It claims that the Guild had the right to proceed *ex parte* to arbitration. But even in this endeavor the Guild was frustrated by Hearst's refusal to recognize the agreement and to appear, and by the Arbitrator's acceptance of that refusal. In view of our decision affirming the District Court's vacatur decision No. 73-1742, it is unnecessary to consider what the effect of a decision might have been against a "company [(Hearst) that] is not making a special appearance, a general appearance or a half-way between appearance."

While there is no doubt that arbitration is the favored path to the solution of labor disputes, there still remains to the courts the duty to oversee the arbitral process to ensure that the parties receive the arbitration that they bargained for. Thus, in this case the Court had jurisdiction to determine arbitrability and then to compel arbitration, *IUOE Local 150 v. Flair Builders, Inc.*, 405 U.S. 487 (1972). But this supervisory function is a far cry from that of an arbitrator

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[2]*United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

taking into his own hands the timeliness of his own appointment, a matter quite *dehors* the agreement and parenthetically quite unsupported by the facts.

It might well be that Hearst's repudiation of the agreement would have given the Guild the right to obtain a judicial determination of its rights on the theory of breach of contract. But after seven years, it is time that the merits of the controversy be decided. The question is should decision be by court or by arbitrator? Even if arbitration be not the exclusive remedy, it is the remedy for which the parties contracted and which the District Court has decreed to be the proper road to follow.

Both parties have cited hosts of cases dealing with the labor problems of other companies under other circumstances. Most of them stand for the proposition that arbitration is to be favored for a solution of labor disputes as indeed it should be if the subject matter of the disputes is put fairly before the arbitrator.

However, this court is not called upon to debate the wisdom of other decisions upon other facts. Our task is to decide the relief which should be granted upon the specific facts before us. Accordingly, we affirm the judgments of the District Court in both appeals except with one slight modification. The seven years have produced no signs of amicable settlement. No benefit will come to either party by continuing their deadlock. In colloquial terms, it is time to get on with it. Therefore, the judgment in No. 73-1742 is modified to the extent that the parties shall have the right to proceed

to have the merits of their disputes arbitrated; that either party, or both, may forthwith request the American Arbitration Association to cause the appointment of an arbitrator who shall be appointed in accordance with its rules; that the arbitrator shall hear and determine the rights of the parties under the agreement including the alternate and dismissal pay benefits and any other issues properly before him; and that such appointment, hearings and determination be made as expeditiously as possible.

No. 73-1838

In view of our decision with respect to No. 73-1742 holding that any and all grievances properly cognizable under the Hearst-Guild collective bargaining agreement be decided by an arbitrator, the judgment in No. 73-1838 is affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS *FOR THE NINTH CIRCUIT*

IN THE MATTER OF ARBITRATION BETWEEN LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, *Petitioner-Appellee,* *vs.* THE HEARST CORPORATION, a corporation, Los Angeles Herald-Examiner, a Division of The Hearst Corporation, and Hillbro Newspaper Printing Company, a Division of The Hearst Corporation, *Respondents-Appellants.*	)	No. 73-1742
	)	ORDER
LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, et al., *Plaintiffs-Appellants,* *vs.* THE HEARST CORPORATION, a corporation, *Defendant-Appellee.*	)	No. 73-1838

[Filed November 12, 1974]

Before: MOORE, WRIGHT and GOODWIN, Circuit Judges.

The panel as constituted in the above cases has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The motion of plaintiffs-appellants in No. 73-1838 to stay the issuance of mandate therein is denied.

APPENDIX C.

In the Matter of Arbitration Between LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, Petitioner,

v.

The HEARST CORPORATION, a corporation, et al., Respondents.

Civ. No. 70-2653-RJK.

United States District Court,
C. D. California.
Jan. 10, 1973.

MEMORANDUM OF OPINION AND ORDER.

KELLEHER, District Judge.

Petitioner, by this proceeding, seeks to vacate an arbitration award. Petitioner filed this action in the Superior Court of the State of California For the County of Los Angeles. Respondents removed the proceeding to this Court by invoking the original jurisdiction conferred by Section 301 of the Labor Management Relations Act of 1947, as amended, (29 U.S.C.A. § 185(a)). [29 U.S.C.A. § 185(a)].

After a trial before this Court the matter was ordered submitted.

The facts are as follows:

On January 28, 1966, the Los Angeles Newspaper Guild (Guild) entered into two collective bargaining agreements with the Hearst Corporation. Negotiations for a new collective bargaining agreement began on

October 15, 1967. Failure to agree on a new contract precipitated a strike by the Guild commencing December 15, 1967. Shortly thereafter the Guild, on behalf of individual employees, demanded dismissal pay and alternative pay benefits under Articles IV and XI of the collective bargaining agreements.

Claiming that the collective bargaining agreement had been terminated due to the strike, Hearst refused payment. It is this refusal to pay that the Guild sought to have arbitrated. However, Arbitrator R. R. Roberts ruled that the grievances filed by the Guild were not arbitrable because of the failure of the Guild to cause the appointment of an arbitrator in a timely manner as required by Article VII of the collective bargaining agreements.

The problem presented to the Court is the extent to which the Court may review the arbitrator's decision. On this point Justice Douglas in United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, at 599, 80 S.Ct. 1358, at 1362, 4 L.Ed.2d 1424 (1960) wrote:

> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

In Holly Sugar Corp. v. Distillery, Rectifying, Wine & A. W. I. U., 412 F.2d 899 (9th Cir. 1969), the court stated at 903:

> "Accordingly, while the courts must insure that the arbitrator's award 'draws its essence from the

collective bargaining agreement' and that his decision does not 'manifest an infidelity to this obligation,' 363 U.S. at 597 [80 S.Ct. 1358], they must resist 'the temptation to "reason out" a la judges the arbiter's award to see if it passes muster.' Safeway Stores v. American Bakery & Confectionery Workers International Union [5 Cir.], *supra* [390 F.2d 79] at 83. Therefore, if, on its face, the award represents a plausible interpretation of the contract in the context of the parties' conduct, judicial inquiry ceases and the award must be affirmed."

Since the arbitrator based his decision on a procedural point not reaching the merits of the claimed grievances, the decision in John Wiley & Sons v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed. 2d 898 (1964), is most pertinent. That action was brought under a section of the Labor Management Relations Act (LMRA) to compel arbitration under a collective bargaining agreement. The Court held that the arbitrator, not the court, is to decide whether procedural pre-requisites under the collective bargaining agreement have been performed. This case seems controlling here and the defendants so argue.

However, the resolution of the issues here presented cannot be accomplished without considering the companion case of Los Angeles Newspaper Guild, Local 69, etc., et al. v. Hearst Corp. et al., 352 F.Supp. 1382 (C.D.Cal. (1973)), in which the Guild sought relief for Hearst's alleged breach of the collective bargaining agreements by repudiation. That case holds that arbitration under the collective bargaining agreements is the exclusive remedy. To deny arbitration,

considering that arbitration is the exclusive remedy, would in effect deprive grievants any opportunity to present anywhere for resolution the merits of their claims.

Hearst steadfastly refused to arbitrate on the ground that the events which gave rise to the grievances occurred after termination of the collective bargaining agreements; their contention was that the Guild's strike in December of 1967 caused a termination of the contractual right to arbitration. Once the arbitrator decided that arbitration was barred on procedural grounds, Hearst changed its tune.

The issue of whether the grievances were in fact properly arbitrable under the collective bargaining agreements has never been resolved. The Guild made a grave error in not bringing a court action to compel arbitration; such an action necessarily would have decided that issue. Then there would be no question as to the validity of the arbitrator's award.

Instead, the Guild chose to prosecute their claims before the State Labor Commissioner. After these efforts proved unsuccessful, despite a finding that the claims were valid, the Guild requested appointment of an arbitrator. Had the arbitrator decided in favor of the Guild, Hearst, no doubt would have refused to abide by the award claiming that the grievances were not properly arbitrable since the collective bargaining agreement under which they arose had been terminated by the Guild's strike. At that point the issue of whether the grievances were properly arbitrable probably would have been presented to a federal court.

This, of course, did not happen. And, if the Court decides that the arbitrator's award must stand, then

Hearst will have had the best of both worlds. On the one hand they argued the matter was not arbitrable under the contract on substantive grounds, while on the other they claim the benefit of the arbitrator's decision that the matter was not arbitrable on procedural grounds.

As earlier indicated, the *Wiley* decision provides the key with which to resolve this matter. At 376 U.S. 556, 557, 84 S.Ct. at 918, the court wrote:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. Even under a contrary rule, a court could deny arbitration only if it could confidently be said not only that a claim was strictly 'procedural,' and therefore within the purview of the court, but also that it should operate to bar arbitration altogether, and not merely limit or qualify an arbitral award."

This language suggests that where, as here, the issue is whether a recalcitrant party (Hearst) was bound to arbitrate has not been decided, this Court is not bound by the arbitrator's ruling denying arbitration on procedural grounds. Manifestly, it is for the Court to decide what is or is not properly arbitrable under collective bargaining agreements.

In United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, at 567-568, 80 S.Ct. 1343, at 1346, (1960), the Court stated:

> "The function of the court is very limited when the parties have agreed to submit all questions

> of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."

The Court in *Wiley*, 376 U.S. 543, at 547, 84 S.Ct. 909, at 913, also stated:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all."

Since Hearst contended that the subject matter of the underlying dispute was not properly arbitrable, until that issue was resolved either judicially or by mutual agreement, the Guild was precluded from unilateral initiation of arbitration pursuant to Article VII § 3(b) of the collective bargaining agreements. As the language of *Wiley* suggests, the duty to arbitrate is created by contractual agreement. Hearst's position was that it had no duty to arbitrate under the collective bargaining agreements with the Guild. If no contractual duty to arbitrate exists, then provisions for unilateral initiation of arbitration are meaningless. Hearst could not have been forced by the unilateral initiation provisions to arbitrate that which it had no contractual duty to arbitrate.

Counsel for the Hearst Corporation, in a hearing before this Court held on October 21, 1971, recognized that:

> "First of all, you (the Court) have to find that the basic underlying dispute is arbitrable. That is the duty of the Court." Reporter's Transcript, October 21, 1971, at 88.

It is clear also from the transcript of the arbitration proceedings held on February 3, 1970, that Hearst did ". . . not intend to relinquish [their] right to have this question of arbitrability resolved in any appropriate court tribunal." Arbitration Proceedings' transcript at 7. It is appropriate that this judicial determination be made. Accordingly, the Court finds that the arbitration award has no effect and must be vacated.

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, at 582-583, 80 S.Ct. 1347, at 1353 (1960).

Utilizing this standard and considering the statement of counsel for the Hearst Corporation made October 21, 1971, (Reporter's Transcript at 88) to the effect that the grievances were arbitrable, this Court holds that the Hearst Corporation is compelled, under the collective bargaining agreements, to resolve the grievances in the manner provided by that agreement.

Upon the foregoing,

It is ordered and adjudged that:

(1) The contract between the parties, so far as it provides for amicable settlement or arbitration of disputes, is in full force and effect.

(2) The arbitrator's award be vacated,

(3) The grievances initiated by the Guild, based upon Articles IV and XI of the collective bargaining agreements are properly arbitrable under those agreements; and

(4) The Los Angeles Newspaper Guild and the Hearst Corporation proceed to adjust their dispute as provided in Article VII of their agreements; provided, however, in the event the parties are unable to reach an amicable settlement as contemplated by sections 1 and 2 of Article VII of their agreement, the parties shall have the right to proceed to have arbitrated the merits of the disputes as provided by section 3 of Article VII of their agreement.

APPENDIX D.

In the Matter of the Arbitration Between Los Angeles Herald-Examiner A Division of The Hearst Corporation And Los Angeles Newspaper Guild Local No. 69	)))))))	ARBITRATOR'S FINDINGS AND AWARD

Grievance: Arbitrability

The instant proceedings were initiated on October 3, 1969, when counsel for the Los Angeles Newspaper Guild, Local No. 69 (hereinafter called the "Guild") addressed a letter to the Los Angeles, California office of the American Arbitration Association. The said letter requested that the American Arbitration Association "appoint an arbitrator" as contemplated by Article VII of a collective bargaining agreement which had been executed on January 28, 1966 by the Guild and the Los Angeles Herald-Examiner, a Division of the Hearst Corporation (hereinafter called the "Company"). The request incorporated the following statements:

> "As you are undoubtedly aware, the strike has been in effect at the Los Angeles Herald-Examiner for some time. . . . A number of the striking employees have resigned their employment and requested the payment of certain alternate benefits which are to be paid under the collective bargaining agreement upon termination, resignation or dismissal. Requests have been made for the payment of similar benefits to the beneficiaries of certain deceased employees.

> The employer has refused and continues to refuse to agree to the selectio[illegible] arbitrator . . . Article VII of the coll[illegible]e bargaining agreement . . . provides for the appointment of an arbitrator by the American Arbitration Association at the request of the complaining party (in this case the union) when the adverse party (in this case the employer) refuses to proceed to the selection of an arbitrator (See Article VII, Section 3 B). Accordingly, we hereby request . . . that the American Arbitration Association appoint an arbitrator pursuant to its rules."

On October 8, 1969, the Guild and the Company were notified in writing that the American Arbitration Association had "appointed Mr. Thomas T. Roberts, Esq., as arbitrator in this matter". Thereafter, a hearing was noticed for February 3, 1970. On January 12, 1970, counsel for the Company advised the participants of his intention to be in attendance at the hearing but with the following reservation: "Any participation on our part at those hearings should not be considered as a general appearance, special appearance, nor recognition of your jurisdiction".

At the commencement of the proceedings convened on February 3, 1970, it was agreed that evidence and argument would initially be restricted to those matters relevant to the contention of the Company that the dispute "is not arbitrable because even if one assumes an obligation [on the part of Management] to arbitrate, the Guild has not satisfied or complied with the requirement of a timely appeal to arbitration".

APPEARANCES

Throughout the course of the hearing of February 3, 1970, both parties were afforded full opportunity to present testimony, introduce evidence and argue the merits of their respective positions. Thereafter, a verbatim transcript of the proceedings was prepared. Finally, opening briefs and reply briefs were submitted. The Union was represented by Mr. Lester G. Ostrov of Bodle, Fogel, Julber and Reinhardt, Attorneys at Law. The Company was represented by Mr. Charles G Bakaly, Jr., of O'Melveny and Myers, Attorneys at Law.

STATEMENT OF FACTS

The collective bargaining agreement identified above provided that it would remain in effect until November 18, 1967. In anticipation of that termination date negotiations were commenced in the fall of 1967. Thereafter, the Company and the Guild continued to meet in an effort to reach agreement upon the terms of a successor contract. Their efforts proved fruitless and on December 15, 1967, the Guild went on strike. The Los Angeles Herald-Examiner continues to be published, however, while the membership of the Guild (including those who have asserted the claims considered herein) remains on strike.

In January of 1968, August Keller, Jr., an employee of the Company and member of the Guild who had honored the picket line, filed a complaint with the Division of Labor Law Enforcement of the California Department of Industrial Relations. The action initiated by Mr. Keller sought recovery of "alternate benefits" as set forth in Article XI of the labor agreement. During the ensuing weeks similar claims for alternate bene-

fits were submitted directly to the Company by other members of the Guild. This circumstance caused Management to send the following letter to the Guild on March 12, 1968:

> "Within the past few weeks we have received inquiries from a number of employees, represented by your union, requesting alternate benefits as provided under Article XI of the most recently expired collective bargaining agreement between us. Aside from the fact that we do not believe that these employees really desire to terminate their employment relationship, but rather are actively engaged in a strike and labor dispute with the Los Angeles Herald-Examiner, we do not believe that either the agreement between your union and us or the provisions of Article XI are applicable or in effect.
>
> We are presently contemplating rejecting the requests of these individual employees on the basis of our beliefs as set forth above. If you desire to discuss this, please advise us."

The claim of Mr. Keller was heard by Deputy Labor Commissioner Otto L. Emerson on March 22, 1968. On March 25th, Mr. Emerson wrote the Company as follows:

> "After listening to testimony given and checking the union contract as well as other documents presented at the hearing held in this office on March 22, 1968, it is the opinion of the undersigned Deputy that claimant August Keller, Jr., has the amount claimed due him.
>
> Please sent a Certified or Cashier's Check in the amount of $10,789.20 to this office immediately."

The Company declined to forward the requested draft and to this date continues to reject the claim of Mr. Keller along with all similar claims.

On March 27, 1968, the Guild responded to the letter of position authored by the Company in the following manner:

> "In reply to your letter of March 12, 1968, please be advised that it is our position that the individuals who have advised you that they desire to receive the alternate benefits referred to in Article II of the Collective Bargaining Agreement dated November 18, 1965 to November 18, 1967, are entitled to receive such benefits.
>
> Unless you afford the requested benefits to the individuals, we will be compelled to take appropriate action to enforce their rights. We would, however, be willing to discuss this matter with you before taking such action, if you so desire."

The meeting contemplated by the above exchange of correspondence took place on April 18, 1968, but without a resolution of the controversy. Even as the discussions progressed, however, additional claims for alternate benefits were received by both the Company and the Division of Labor Law Enforcement. During this same period of time a different and distinct group of claims was likewise lodged with the Company by representatives of deceased members of the Guild who had been employed by the Los Angeles Herald-Examiner when the strike began. The latter type of claim sought the payment of "dismissal pay" under the authority of Article IV, Section 4 of the labor agreement.

On June 7, 1968, the Company put the Guild on notice of its position regarding the requests for dismissal pay by forwarding a letter which in part stated:

> "We have recently received a request from a widow of a former employee, who is represented by your union, requesting payment of her deceased husband's dismissal pay, pursuant to the provisions of Article IV, Section 4, of the most recently expired collective bargaining agreement between the Los Angeles Newspaper Guild and the Los Angeles Herald-Examiner.
>
> It is our belief that said agreement is no longer in effect; consequently, the provisions of Article IV, Section 4 are likewise not applicable or in effect.
>
> We are presently contemplating rejecting this request on the basis of the beliefs as set forth above. We will, however, be pleased to meet with you and discuss this matter prior to taking any further action, . . ."

The meeting suggested in the foregoing correspondence was convened on June 14, 1968, but the parties thereafter adjourned without reaching a mutually satisfactory resolution of the disputes involving alternate benefits and dismissal pay. In response to that impasse, the Guild dispatched the following letter to the Company on June 19, 1968:

> "Pursuant to Article VII, Section 3, of the collective bargaining agreement made and entered into on January 28, 1966, between Los Angeles Herald-Examiner Division of The Hearst Corporation and Los Angeles Newspaper Guild, the Los Angeles Newspaper Guild hereby demands arbitration

of the grievances raised in our letter of March 27, 1968, to wit, your refusal to pay alternate benefits, pursuant to Article XI of the collective bargaining agreement, to certain employees who have terminated their employment and have applied for said benefits.

As we stated in discussions with you on April 18, 1968, concerning this dispute, and in our letter of March 27, 1968, all of the employees involved are eligible for said alternate benefits, and it is our position that they are entitled to said benefits.

We will be happy to meet with you at your convenience to select an arbitrator pursuant to Article VII, Section 3A. Please advise us of a suitable time and place for such a meeting."

The request of the Guild for agreement to submit the alternate benefits dispute to arbitration was denied by the Company on July 1, 1968 when it wrote Local No. 69 as follows:

"Receipt is hereby acknowledged of your letter of June 19, 1968 wherein the Guild demands arbitration of an alleged grievance relative to alternate benefits.

The Company must respectfully reject your demand for arbitration of this matter on the grounds that it arises out of events subsequent to the expiration of the Guild's collective bargaining agreement with the Los Angeles Herald-Examiner."

The Guild next wrote the Company regarding alternate benefits on August 5, 1968 when it forwarded the following letter:

"Los Angeles Newspaper Guild, Local 69, has been informed that Robert M. Oates, an employee

of the Herald-Examiner and a member of this Union, terminated his employment with the Herald-Examiner on June 12, 1968 and requested payment of the alternate benefits due him under Article XI of the collective bargaining agreement entered into on January 28, 1966, effective November 18, 1965, between the Herald-Examiner and this Union. We have also been informed that you refused the payment of said alternate benefits to Mr. Oates.

Pursuant to Article VII, Section 2 of said collective bargaining agreement, we hereby submit a grievance on behalf of Mr. Oates over your refusal to pay alternate benefits to him. As we have stated previously in discussions with you and in letters to you, it is our position that the employees who have terminated their employment and applied for said alternate benefits are entitled to said benefits and we request, therefore, that you pay the benefits to each of the employees involved, including Mr. Oates.

Since we have already considered this dispute previously with respect to other employees, and since it is our understanding that you do not intend to pay said benefits, we would also at this time request that Mr. Oates' grievance be submitted to arbitration.

There undoubtedly are other employees of the Herald-Examiner who have terminated their employment and requested alternate benefits since our previous discussions concerning this dispute, and there undoubtedly will be others who will do so in the future. Inasmuch as you have refused to make the payments involved and since you have

rejected our previous demand for arbitration of this dispute, it would be futile for us to continue filing grievances and demanding arbitration for each individual employee who requests alternate benefits and is refused in the future. We, therefore, will not in the future file individual grievances and request arbitration of each individual dispute. It is our position, however, that each individual similarly situated to those individuals whom we have previously discussed in regard to this matter, is entitled to be paid alternate benefits. We hereby submit to you a grievance on behalf of all individuals whom we have not previously discussed who may have been denied alternate benefits since December 15, 1967 and on behalf of all individuals who are denied said benefits in the future, subject to notice to the contrary from us. We further demand that this grievance on behalf of all of said individuals be submitted to grievance (sic)."

The response of the Company was immediate. On August 6th it sent the following reply:

"Receipt is hereby acknowledged of your letter of August 5, 1968, wherein the Guild demands arbitration of all alleged present and future grievances relative to Alternate Benefits.

As we previously advised you on July 1, 1968, the Company must respectfully reject your demand for arbitration on this matter on the grounds that the issue arises out of events subsequent to the expiration of the Guild's collective bargaining agreement with the Los Angeles Herald-Examiner."

There followed a written request from the Guild for the payment of dismissal pay to the widow of a deceased member "as provided by Article IV, Section 4 of the agreement". This request was denied by the Company on the following day. The denial took the form of a letter which reads in its entirety as follows:

> "Receipt is acknowledged of your letter of August 13, 1968, wherein you request payment, on behalf of Mrs. Donald Shubb, of alternate benefits (dismissal pay) by virtue of Mrs. Shubb's husband, Donald, having passed away on July 25, 1968.
>
> On June 7, 1968, we wrote to Mr. Rupert relative to a similar claim on behalf of Mrs. Patricia D. Skidmore. On that occasion, we advised Mr. Rupert that it was our belief that the provisions of Article IV, Section 4 of the recently expired collective bargaining agreement between the parties was not applicable or in effect, but we offered to meet with Mr. Rupert for the purpose of discussing this matter. On June 14, 1968, Mr. Sjostrom and I met with Mr. Rupert, and during the course of this meeting, both parties fully explored all aspects of this claim.
>
> At the conclusion of this meeting, it was fully understood by both parties that it was the Company's position that Article IV, Section 4 of the recently expired agreement was not applicable or in effect. Conversely, it was understood by both parties that it was the Guild's position that said article and section were in effect.
>
> Since June 14, 1968, the Company has not received any additional evidence to occasion a

change in the Company's position on this matter as explained to Mr. Rupert. Consequently, the Company must again advise you that it is our position that Article IV, Section 4 of the recently expired collective bargaining agreement between the Los Angeles Newspaper Guild and the Los Angeles Herald-Examiner is no longer in effect; similarly, provisions of Article IV, Section 4 are likewise not applicable or in effect.

In view of the foregoing, we must respectfully deny your request for alternate benefits (dismissal pay) to Mrs. Donald Shubb."

It will be recalled that certain members of the Guild had filed claims for alternate benefits with the Division of Labor Law Enforcement. Deputy Labor Commissioner Emerson heard these claims on September 30 and December 11, 1968. On December 12, 1968, he sent the following notice to the Company:

"After studying all the evidence presented and listening to testimony given at the two hearings held in this office on September 30, 1968 and December 11, 1968 and discussing same with our legal staff, it is the opinion of the undersigned that you owe the following verified claims for severance pay:

James K. Blake	$ 8838.00
Frank L. Donoghue	3646.00
William L. Finley	8303.50
William M. Greene	3744.00
Oscar Gabe Holt	2898.00
August Keller, Jr.	9990.00
Louis Ketchel	5155.50
Robert M. Oates	11,244.80

Bryon D. Osborne	8838.00
Robert A. Perez	7365.00
Edward W. Prendergast	8203.50
Jack A. Rarick	7363.00
Fred J. Simon	8838.00
Clifford C. Smith	8838.00
Frederick C. Traylor	7878.00
Edwin T. Vaughn	8838.00
Proctor H. Weir	13,653.00
Warden G. Wentz	12,513.00
TOTAL	$146,047.30

Please send Cashier's Check or Certified Check for this amount to this office within ten days."

The Company declined to honor the claims incorporated in the demand of Deputy Commissioner Emerson and there followed a series of consultations between the Guild and his office. Local No. 69 was initially advised that a criminal complaint would be sought but this technique proved unavailable when the Los Angeles City Attorney refused prosecution in April of 1969. During the following month, Mr. Emerson explored the alternate possibility of initiating a civil court action against the Company. Once again, however, he failed to secure the support of the appropriate legal office and he thereupon remitted the entire matter to the individual claimants. Formal notice of the said action was mailed to the Guild on May 12, 1969. In relevant part, the notice incorporates the following statements of Mr. Emerson:

> "This Division attempted to file a violation of Section 216 of the Labor Code in behalf of your members. The City Attorney's office rejected this complaint.

> After a discussion with our Legal Staff, they informed me that they could not file a civil suit on behalf of your members.
>
> We therefore had no alternative, and have reassigned these claims back to your members. Claimants have been advised to contact their union immediately."

In May of 1969, the Guild wrote all of its members who had gone out on strike but had subsequently "resigned and applied for alternate benefits". It advised each of them that Local No. 69 "has retained an attorney in an attempt to collect the benefits for you" and requested "copies of all pertinent documents . . . to help speed the case to court".

On August 13, 1969, the Guild wrote to the Company as follows:

> "Since the commencement of the labor dispute between Los Angeles Newspaper Guild, Local 69, the Union and the Los Angeles Herald-Examiner, the following employees of the Herald-Examiner have resigned their employment and requested the payment of alternate benefits pursuant to Article XI of the collective bargaining agreement entered into on January 28, 1966, effective November 18, 1965, between the Herald-Examiner and the Guild:
>
> [The letter set forth the names of thirty-four members of the Guild for whom Local No. 69 sought alternate benefits].
>
> It is the Union's understanding that the Company has refused to pay alternate benefits, pursuant to Article XI of the aforementioned collective bargaining agreement, to all of the above named individuals.
>
> . . .

As you are aware, the Union's position in this matter has not changed since our earlier meeting with you and since our previous correspondence. Nevertheless, in view of the additional resignations and new refusals by the company to pay alternate benefits, the union hereby reiterates its position that all employees who have terminated their employment and applied for alternate benefits are entitled to said alternate benefits.

. . .

On behalf of all of the above named employees the union further demands that this matter immediately be referred to arbitration. . . .

Please be further advised that the following former employees of the Herald-Examiner have died since the commencement of the strike: [There followed the names of eleven deceased Guild members]. . . . Since it is the union's understanding that the Company has refused to pay the beneficiaries of these employees in accordance with Article IV, and since we have previously corresponded with you regarding the Company's refusal to pay dismissal pay to the beneficiaries of certain of the above named employees, the union hereby demands that this matter also be submitted to arbitration. . . . We are prepared to meet with you at any mutually convenient time and place for the purpose of selecting an impartial arbitrator. If we do not hear from you by August 20, 1969, we will assume that you have refused to proceed to the selection of an arbitrator, and we shall request the American Arbitration Association to appoint an arbitrator in accordance with Article VII of the aforesaid collective bargaining agreement."

Once again, the response of the Company was almost instantaneous. On August 15, 1969, the following letter was mailed to the Guild:

> "Receipt is hereby acknowledged of your letter of August 13, 1969, relative to the Los Angeles Herald-Examiner's refusal to make payments for certain claims pursuant to the provisions of Articles IV and XI of the most recently expired bargaining agreement between the Los Angeles Newspaper Guild and the Herald-Examiner.
>
> As you know, the Herald-Examiner has consistently refused to honor requests for such payments on various grounds, including the ground that neither the agreement between your Union and the Herald-Examiner, nor the provisions of Article IV or Article XI are applicable or in effect. In addition to the foregoing, the Herald-Examiner also has other defenses to such claims and requests.
>
> Inasmuch as it is our position that the collective bargaining agreement between your Union and the Herald-Examiner terminated on December 15, 1967, we must decline your request to meet for the purposes of selecting an Arbitrator or proceeding to arbitration.
>
> However, we are willing to meet with you concerning the subject matter of the claims referred to in your letter, at a time and place mutually convenient, but it should be clearly understood that we will not meet with you for the purpose of selecting an impartial Arbitrator or otherwise proceeding to arbitration."

There followed the Guild letter to the American Arbitration Association dated October 3, 1969 in which the appointment of an arbitrator was requested under the authority of Article VII of the agreement. Finally, a hearing was convened on February 3, 1970.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE IV
DISMISSAL PAY

Section 4—In the event of the death of any employee with six (6) or more months of service the Publisher agrees that the beneficiaries of the deceased, designated by the employee in writing in advance, shall be paid a sum equivalent to that which the deceased would have been paid had he been discharged under the terms of this contract, but in no event less than five hundred dollars ($500.00), less any legal costs or expense caused the Publisher in making said payments.

ARTICLE VII
ADJUSTMENT OF DISPUTES

Section 2—A grievance shall be submitted only by a written notice from the complaining party to the other party within sixty (60) days of the event giving rise to the grievance. Said notice shall set forth the facts giving rise to the grievance, the ground of complaint and the action or remedy requested.

Section 3—A grievance raised under Section 2 above, must be resolved, dismissed or submitted to arbitration within sixty (60) days following receipt of the written notice provided for in Section 2 above. By mutual agreement, any properly sub-

mitted grievance may be moved to arbitration at any time within said sixty (60) day period.

A party desiring arbitration shall serve written demand, therefore, upon the opposing party within sixty (60) days of the written notice provided for in Section 2 above, whereupon the following procedure shall apply:

A. Within five (5) days of the written notice of arbitration hereinbefore prescribed, the parties shall meet to select an arbitrator to whom the grievance of the complaining party shall be submitted for final decision.

B. If such an arbitrator is not selected, or the party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator, or if for any other reason an arbitrator is not selected or secured, within the aforesaid five (5) day period, then the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator pursuant to the present rules of the voluntary labor arbitration tribunal of the American Arbitration Association, and the grievance shall be submitted to such arbitrator for final decision.

C. The arbitrator shall follow rules of procedure agreed to by the parties, but in the absence of agreement thereon, the rules of the voluntary labor arbitration tribunal of the AAA shall govern.

Section 4—It is specifically agreed and understood that the time limits specified in this Article shall be observed unless amended, or extended, by

mutual written agreement of the parties. For the purpose of calculating time under this Article, it is agreed and understood that Saturdays, Sundays and Holidays, as recognized by this Agreement, shall not be considered.

ARTICLE XI
ALTERNATE BENEFITS

Section 1. Upon reaching the age of sixty-five (65), or upon completion of twenty-five (25) years of continuous and uninterrupted service, as hereinbefore defined in Article IV, or upon certification of a doctor designated by the Publisher that the employee is permanently incapacitated from discharging his duties, such employee may terminate his employment and upon written application to the Publisher shall receive a cash lump sum based on years of continuous and uninterrupted service as hereinbefore defined in Article IV as follows:

Less than 5 years of service	5 weeks
5 to 10 years of service	15 weeks
10 to 12½ years of service	20 weeks
12½ to 15 years of service	25 weeks
15 to 17½ years of service	30 weeks
17½ to 20 years of service	35 weeks
20 to 22½ years of service	40 weeks
22½ to 25 years of service	45 weeks
25 to 27½ years of service	50 weeks
27½ to 29½ years of service	56 weeks
29½ years of service and over	60 weeks

Section 2. Payments under this Article shall be in lieu of any other terminal pay under the dismissal pay provisions of Article IV.

POSITION OF THE GUILD

It is the contention of Local No. 69 that the Guild has complied with all of the procedural requirements expressed in Article VII of the collective bargaining agreement. It argues the grievances seeking alternate benefits and dismissal pay are therefore arbitrable and subject to disposition on their merits. The Guild states it submitted a demand for arbitration within sixty working days of the "written notice" contemplated by Section 2 of Article VII and thereby complied with the initial requirement of Section 3. It asserts that when thereafter faced with the refusal of the Company "to meet to select an arbitrator" Local No. 69 was relieved of any obligation to immediately request such an appointment through the American Arbitration Association.

The Guild notes that Article VII of the agreement carefully assigns time periods for the filing of grievances and their referral to arbitration, but is singularly silent as to any time limitation within which "to proceed to the appointment of an arbitrator". It is said that the absence of a specific time increment for the assertion of such a request conclusively demonstrates the intent of the parties to create "an unlimited right which may be exercised at any time".

Local No. 69 further contends that even if Section 3 of Article VII were interpreted as requiring referral to the American Arbitration Association within a reasonable period of time following the refusal of the Company to participate in the selection of an arbitrator, under the circumstances present in the instant case the Guild acted with due dispatch. It cites as justifiable delay the decision of its officers to first proceed with

the prosecution of the complaints before the Division of Labor Law Enforcement in the hope that to do so "would prevent the necessity of going to arbitration, thereby saving time and expense". The Guild also argues that "much of the delay in reaching arbitration arises as a direct result of the Company's total repudiation of the agreement and total repudiation of its obligation to arbitrate". In addition thereto, it suggests "a major factor in the instant case which cannot be ignored is the fact that a strike by the Union against the Company has been in progress since December 15, 1967".

The Guild concludes by suggesting the Company is attempting to bar a hearing on the merits of the disputes at hand by raising the equitable defense of laches. It insists laches may not be found in the absence of prejudice to the party seeking to assert that doctrine and "no prejudice to the company has occurred as a result of any delay"

In conclusion, the Guild states the following contention: "The Company has repudiated arbitration and the contract, has refused to abide by the arbitration provisions of the contract, has refused to proceed to arbitration or to select an arbitrator, and is therefore estopped from claiming that the Union has failed to abide by the procedural requirements of the contract".

POSITION OF THE COMPANY

The Company responds by arguing that the collective bargaining agreement expired before the accrual of the claims submitted herein, before any of the present grievants had submitted such claims to Management, and before the Guild made its first request for arbitration. It adds that even if there had existed an obli-

gation to arbitrate, "these grievances are still not arbitrable because the Guild did not timely seek the appointment of an arbitrator". Management contends the "right" to request such an appointment by the American Arbitration Association must be exercised within a reasonable period of time following the notice of appeal to arbitration under Section 3 of Article VII. It notes the Guild was free to at any time request the designation of an arbitrator but failed to act prior to October 3, 1969.

The Company asserts the responsibility of a complaining party to proceed to arbitration within a reasonable period of time has been recognized by both arbitrators and the courts, particularly where the other side has been guilty of neither delay nor misrepresentation. It argues that the delay of the Guild in the present case was excessive because the referral to the American Arbitration Association did not occur until 389 working days after the March 27, 1968 presentation of the written notice of demand for payment of alternate benefits. As to the dismissal pay claims, the Company states 256 working days elapsed between the notice of grievance dated August 13, 1968 and the demand for arbitration submitted on August 13, 1969.

In conclusion, the Company contends the Guild may not seek to justify its delay by directing attention to the proceedings prosecuted before the Division of Labor Law Enforcement because in so acting it knowingly assumed the risk that to do so might compromise any subsequent effort to obtain arbitration.

DISCUSSION

It is appropriate at the outset to again state the limited scope of the present inquiry. This may be accomplished by first reciting what is not at issue. In doing so it is to be observed that the question is not whether the severance benefits identified in Article IV and Article XI of the collective bargaining agreement represent "rights" which have vested and thus survive the turmoil attendant upon the economic action initiated by Local No. 69 on December 15, 1967. Nor is the finality of the announced intent of the Guild members to actually resign in order to gain alternate benefits a factor to be presently considered. What is now subject to adjudication is the narrow issue of whether or not the Guild sought the appointment of an arbitrator in a timely manner. Indeed, for this purpose it may be assumed that the obligation of Management to submit to arbitration continued beyond the termination of the collective bargaining agreement.

It is unquestionably true that the stakes in this arbitration are high. The number of Guild members claiming severance benefits thus far is in excess of forty-five and the total of the yet unidentified grievants will presumably be substantially in excess of that figure. Each of them lays claim to "a cash lump sum" in varying but substantial amounts which in the aggregate exceed $150,000.00. The Guild further notes that the benefits sought are computed on the basis of continuous and satisfactory service to the Company, frequently over a period of considerable duration. It argues that under

such circumstances a finding of non-arbitrability because of a failure to comply with the technical provisions of the collective bargaining agreement relating to the processing of grievances would result in manifest injustice.

I am in agreement with the principle that wherever possible disputes should be resolved on their merits and not turn on procedural niceties which serve to preclude independent inquiry. Furthermore, an indiscriminate endorsement of defenses founded upon concepts relating to estoppel or laches should be avoided. This is not to say, however, that the expressed intent of the parties when adopting a precise and structured procedure governing the adjustment of disputes may be brushed aside in the name of equity. If the parties to a collective bargaining agreement deny their arbitrator any "authority to change, amend, modify or terminate" the provisions of that document (as did the Company and the Guild in Article VII, Section 3) it would constitute an abuse of arbitral office were he to disregard the mandate solely because of a desire to judge the substantive worth of a grievance claim. Further, Section 4 demands that "the time limits specified in this Article shall be observed unless amended, or extended, by mutual written agreement of the parties". No such understanding or extension has been revealed by the evidence.

The Guild urges a finding that the Company is now estopped from invoking the time limits found in Article VII because "it has totally disregarded and destroyed the arbitration provisions of the contract, and completely thwarted every effort of the Union to bring this matter to arbitration through the normal channels and under the procedure normally utilized by the parties". The difficulty with this contention lies in the fact

that the Guild and its members possess no right to arbitrate grievances except as that procedure is established in the labor agreement. If the contractual authority which permits appeals to arbitration is to be honored, it must be applied in its entirety or not at all. The time limits which appear in Article VII represent the dominant theme of that provision. The Guild cannot now be heard to disclaim what is embarrassing while concurrently invoking only that which offers hope of victory.

It follows from what has been said above that the Company need not rely on the doctrine of laches. To the contrary, it is the burden of the Guild to show compliance with the "statute of limitations" adopted in Article VII. This is not a case of negligent delay on the part of one party coupled with an absence of defined time limits so as to bring injury to the other party. To the contrary, Sections 2 and 3 of Article VII call out specific time increments applicable to each stage of grievance processing. Only the right of the complaining party to unilaterally call for the appointment of an arbitrator is free from a specific time limitation. As to the latter procedure, however, it is significant to note that the right of referral to the American Arbitration Association constitutes an integral part of a carefully defined system which contemplates a timely movement of grievances to arbitration. A complaining party is afforded sixty days from the protested event in which to file "written notice" of a grievance. An additional sixty days is permitted for the submission of an appeal to arbitration. At that point, however, the time increments accelerate. Only five days are available for the effect to mutually select an arbitrator. In the absence of such mutuality, the complaining party must then turn to the

American Arbitration Association for the appointment of an arbitrator. Surely the parties intended that this last act would be accomplished within a reasonable period of time rather than forever remaining "an unlimited right which may be exercised at any time" as suggested by the Guild.

Nor may the Guild successfully assert ignorance of the procedural disability inherent in a failure to adhere to the strictures imposed upon the processing of grievances. By its own admission the presentation of the June 19, 1968 request for arbitration of the alternate benefit grievances was carefully timed to fall on the 59th working day following the Section 2 written notice given on March 27, 1968. Thus a full six months after the commencement of the strike the Guild recognized an obligation of fidelity to the terms of Article VII if claims were to be arbitrated. Only when it thereafter elected to concentrate on the proceedings before the Division of Labor Law Enforcement did it announce a belief that those time limits were no longer binding.

The earlier sensitivity of the Guild to the procedural precepts expressed in Article VII is perhaps more understandable when it is noted that the practice of the parties during the life of the collective bargaining agreement saw the selection of an arbitrator occur within sixty calendar days (rather than working days) of the demand for arbitration. This was true in each of the six grievances appealed to arbitration by the Guild. If during the life of the agreement the parties demonstrated their intent by adhering to such a schedule, I cannot understand how it may now be said that a different rule should apply simply because of the availability of an alternate tribunal, i.e., the Labor Commissioner.

What were the operative events which in the case at hand triggered the commencement of the time periods set forth in Sections 2 and 3 of Article VII? The first written demand for the payment of alternate benefits appears in the Guild letter of March 27, 1968. This followed the March 12, 1968 advice of Management that the Company was "presently contemplating rejecting the requests" for such payments. The Guild therefore initiated the first alternate benefits grievance "within sixty (60) days of the event giving rise to the grievance" as required by Section 2. Furthermore, as noted above the subsequent written demand for arbitration dated June 19, 1968 was filed on the 59th working day following the presentation of the grievance and therefore met the initial requirement of Section 3. The Company then unequivocally denied the grievance on July 1, 1968. Rather than thereupon securing the appointment of an arbitrator through the assistance of the American Arbitration Association, the Guild chose to file what might be termed a class grievance protesting the failure to award alternate benefits to "each individual similarly situated to those individuals whom we have previously discussed" and again demanded arbitration.

The response to the second request for arbitration was immediate. On the following day the Company again rejected the overture in writing. It was at this point in time that the Guild assumed an obligation under the contract it sought to enforce, an obligation to act with reasonable dispatch and "request the American Arbitration Association to proceed to the appointment of an arbirtator". Rather than doing so, however, Local No. 69 determined "it would be to our advantage to proceed with the Labor Commissioner" be-

cause it entertained a "hope that the criminal action by the Labor Commissioner might resolve the matter more quickly". A calculated judgment was thus reached and it must be presumed that all possible risks attendant thereto were considered. In any event, it was not until more than one year later that mention was next made of a desire on the part of the Guild to arbitrate the alternate benefits claim. In my judgment, the letter of August 13, 1969 came too late. The demand set forth therein "that this matter immediately be referred to arbitration" was presented 353 working days after the original grievance letter of March 27, 1968 and 256 working days subsequent to the second grievance filed on August 13, 1968. Beyond all of that, it was dated three months after the Guild had formally been notified by Deputy Labor Commissioner Emerson he had been denied access to the courts. Finally, the Guild delayed still further in requesting the American Arbitration Association to appoint an arbitrator, an action not initiated until October 3, 1969, i.e., some 100 working days following the disclaimer notice from Mr. Emerson.

The delay in the prosecution of the dismissal pay grievances is even more aggravated. That claim was first reduced to writing by the Guild on August 13, 1968 when it submitted a request for payment on behalf of the survivor of a deceased former employee. Once again, the Company unequivocally denied the claim on the very next day. Thereafter, the matter was abandoned until the posting of the letter of August 13,

1969. Thus what was once a timely grievance protesting an earlier statement of the Company dated June 7, 1968 became a casualty of forum shopping and ignored until one day short of the passage of an entire year.

The Guild correctly notes that the relationship of the parties during this period of time was something other than "normal". More specifically, a strike was in progress and the Company continued to meet with the representatives of its employees solely under the compulsion of Section 8(a)(5) of the National Labor Relations Act. Furthermore, two hearings were conducted by Deputy Labor Commissioner Emerson during the interim period and the attention of the Guild was directed to the perfection of those claims. Nevertheless, nothing in the record lends the slightest support to the charge of the Guild that the Company was somehow guilty of "thwarting" its desire to arbitrate, or that Management otherwise contributed to the delay. Indeed, Article VII was negotiated in anticipation of precisely the circumstance faced by the Guild, i.e., a refusal by one of the parties to take part in the selection of an arbitrator. The sum total of the effort demanded of the Guild when confronted with the flat rejection of the viability of its grievances by the Company was no more than to address a letter to the American Arbitration Association as was ultimately done on October 3, 1969. I can find no satisfactory explanation for its failure to do so earlier nor an unreasonable burden in such a procedure. In my judgment the grievances protesting the failure of the Company

to honor the claims for alternate benefits and dismissal pay were not appealed to arbitration in a timely manner and they are therefore not now arbitrable.

AWARD

The grievances filed by the Los Angeles Newspaper Guild which call upon the Los Angeles Herald-Examiner to recognize claims for dismissal pay under Article IV and for alternate benefits under Article XI of the collective bargaining agreement executed on January 28, 1966 are not arbitrable because of the failure of the Guild to cause the appointment of an arbitrator in a timely manner as required by Article VII of the said agreement.

DATED: August 12, 1970.
Rolling Hills, California.

/s/ Thomas T. Roberts
Thomas T. Roberts, Arbitrator

State of California, County of Los Angeles—ss.

On August 12, 1970, before me personally appeared THOMAS T. ROBERTS, known to me to be the person whose name is subscribed to the within instrument and he acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

/s/ Nadine M. Richardson

APPENDIX E.

ARBITRATION CLAUSE FROM THE APPLICABLE COLLECTIVE BARGAINING AGREEMENT.

Article VII—Adjustment of Disputes.

SECTION 1—A Grievance Committee, designated by the Guild, shall be established to settle amicably with a committee appointed by the Employer, all grievances arising under this Agreement.

SECTION 2—A grievance shall be submitted only by a written notice from the complaining party to the other party within sixty (60) days of the event giving rise to the grievance. Said notice shall set forth the facts giving rise to the grievance, the ground of complaint, and the action or remedy requested.

SECTION 3—A grievance raised under Section 2, above, must be resolved, dismissed or submitted to arbitration within sixty (60) days following receipt of the written notice provided for in Section 2 above. By mutual agreement, any properly submitted grievance may be moved to arbitration at any time within said sixty (60) day period.

A party desiring arbitration shall serve written demand therefore upon the opposing party within sixty (60) days of the written notice provided for in Section 2 above, whereupon the following procedure shall apply:

A. Within five (5) days of the written notice of arbitration hereinbefore prescribed, the parties shall meet to select an arbitrator to whom the grievance of the complaining party shall be submitted for final decision.

B. If such an arbitrator is not selected, or the party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator, of if for any other reason an arbitrator is not selected or secured, within the aforesaid five (5) day period, then the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator pursuant to the present rules of the voluntary labor arbitration tribunal of the American Arbitration Association, and the grievance shall be submitted to such arbitrator for final decision.

C. The arbitrator shall follow rules of procedure agreed to by the parties, but in the absence of agreement thereon, the rules of the voluntary labor arbitration tribunal of the AAA shall govern.

D. Expenses of arbitration which are jointly incurred shall be shared equally by the parties, except that neither party shall be required to pay any part of the cost of a stenographic record without its consent, provided that failure of a party to agree to share the cost of such stenographic record shall be deemed a waiver of such party's right of access to the record.

E. The award of the arbitrator shall be final and binding.

F. It is agreed that the arbitrator shall have no authority to change, amend, modify or terminate any provision(s) of this Agreement.

SECTION 4—It is specifically agreed and understood that the time limits specified in this Article shall be observed unless amended, or extended, by mutual written agreement of the parties. For the purpose of calculating time under this Article, it is agreed and understood that Saturdays, Sundays, and Holidays, as recognized by this Agreement, shall not be considered.

APPENDIX F.

Opinion of the United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AUGUST PAUL ROSSI, *Plaintiff-Appellant,*	)	
vs.	)	No. 73-1458
TRANS WORLD AIRLINES, INC., *Defendant-Appellee.*	)	OPINION

[November 27, 1974]

Appeal from the United States District Court
For the Central District of California

Before: TRASK, CHOY and GOODWIN, Circuit Judges.

PER CURIAM:

Rossi, a flight engineer employed by TWA, enrolled in the company's First Officer Training Program. Because his progress in the program was unsatisfactory, he was dismissed from the program and discharged as flight engineer. The Pilots' System Board of Adjustment, an arbitration board established by the collective bargaining agreement pursuant to the mandate of the Railroad Labor Act as applied to air carriers, 45 U.S.C. § 184, sustained his dismissal.

Rossi sought reinstatement in district court, claiming that failure to complete the training program bore no rational relationship to his ability to continue serving as flight engineer. The court refused to review the

Board's award and granted TWA summary judgment. Rossi appeals. We affirm.

Awards of the National Railroad Adjustment Board (NRAB) enjoy the same finality as awards of arbitration panels. *Gunther v. San Diego & A.E.R. Co.*, 382 U.S. 257, 263 (1965); *Barrett v. Manufacturers R. Co.*, 453 F.2d 1305, 1307 (8th Cir. 1972). Therefore, whether awards of airline adjustment boards established pursuant to 45 U.S.C. § 184 should be treated like those of private arbitration boards rather than like those of the NRAB is irrelevant in the context of this dispute. Courts will not review the merits of arbitration awards so long as the award is based properly on the applicable collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960).[1] An arbitrator is not confined to the express terms of the contract, however. Where the contract is not explicit, he may apply the "common law of the shop." *Anaconda Co. v. Great Falls Mill & Smeltermen's Union No. 16*, 402 F.2d 749, 752 (9th Cir. 1968).

When the Pilots' Adjustment Board decided that Rossi's discharge was justified, it decided his case on its merits, not on a procedural technicality. Therefore, so long as that decision was based on TWA's collective bargaining agreement, it is not subject to our review.[2]

---

[1]See Devita v. Burlington Northern, Inc., 494 F.2d 347, 348 (9th Cir. 1974); Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers Int'l Union, AFL-CIO, 412 F.2d 899, 903 (9th Cir. 1969); San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327 (9th Cir. 1969); Anaconda Co. v. Great Falls Mill & Smeltermen's Union No. 16, 402 F.2d 749, 752 (9th Cir. 1968).

[2]The Railway Labor Act provides three statutory bases for judicial reversal of NRAB arbitration awards, none of which permits reexamination of the merits: failure to comply with the Act, lack of jurisdiction and fraud or corruption by a member of the Board. 45 U.S.C. §153 (First) (p), (q).

Rossi argues that the Board had no reasonable basis to decide that his dismissal as flight engineer was justified simply because he failed to achieve promotion to first officer. The arbitration board, drawn from the industry, was better able to make that determination than is this court. The Board may have found that the company's policy of dismissing employees who failed in programs leading to promotion was so well-known and accepted by both union and management as to be part of the "common law" of the TWA agreement. In any event, we cannot require an arbitration board to spell out for our benefit the logical process by which it makes its decision. *Enterprise Wheel,* 363 U.S. at 598. We find no indication in the record that the Board ignored the terms of the collective bargaining agreement—as derived both from its express provisions and from the customary practices of the industry—and dispensed its "own brand of industrial justice." *Id.* at 597.

The court correctly granted summary judgment. Following TWA's motion, supported by affidavits, Rossi failed to support by affidavits any factual allegation necessitating a trial. His affidavit alleging fraud and corruption by the Board in arriving at its decision contained only inadmissible hearsay and was properly disregarded by the trial court. Fed.R.Civ.P. 56(e).

Affirmed.

SUPREME COURT, U. S.
FILE
MAR 3
MICHAEL RODAK, J

No. 74-1086

IN THE

Supreme Court of the United States

October Term, 1974

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC; *et al.*,
Petitioners,

vs.

THE HEARST CORPORATION, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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SUBJECT INDEX

Page

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 1

Opinions Below 2

Jurisdiction 3

Questions Presented 3

Statute Involved 4

Statement of the Case 4

Reasons for Granting the Writ 12

1. The Decision Below Conflicts With the Principle Set Forth in Vaca v. Sipes, 386 U.S. 171 (1967) and in Decisions in Various Circuits That Arbitration Is Not the Exclusive Remedy When a Party Has Repudiated the Agreement or the Arbitral Remedy 12

2. The Decision of the Court of Appeals Conflicts in Principle With U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971) Which Holds That Arbitration Is Not the Exclusive Remedy With Respect to Wage Claims of Seamen Asserting Their Statutory Remedies 15

3. If Hearst's Petition for Writ of Certiorari With Respect to the Decision Below Ordering Arbitration (Sup.Ct. No. 74-982) Is Granted, the Instant Petition Should Also Be Granted 17

Conclusion 23

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit .....App. p. 1

Appendix B. Memorandum of Opinion and Order .. 16

TABLE OF AUTHORITIES CITED

Cases	Page
Agar v. Winslow, 123 Cal. 589 (1899)	15
Bierce v. Hutchins, 205 U.S. 340 (1907)	15
Brooklin Eagle, Inc., 49 L.A. 147 (Arb. Willard Wirtz, 1959)	19
Division of Labor Law Enforcement v. Ryan Aeronautical Co., 106 Cal.App.2d 833 (1951)	16
Fredericksen v. Renard, 247 U.S. 207 (1918)	15
Gibson v. City of San Diego, 25 Cal.2d 930 (1945)	20
Henderson Tire & Rubber Co. v. Gregory, 16 F. 2d 589 (8th Cir., 1926)	15
Hercules Powder Co. v. Brookfield, 189 Cal. 531, 53 S.E.2d 804 (1949)	19
H. K. Porter Co., 49 L.A. 147 (Arb. Sidney L. Cahn, 1967)	19
Hollingsworth, Estate of, 37 Cal.App.2d 432 (1940)	16
Hunter v. Sparling, 87 Cal.App.2d 771 (1948)	20
Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir., 1948)	16
Intl. Assn. of Machinists v. Hayes Corp., 296 F. 2d 238 (5th Cir., 1961)	13
Kern v. City of Long Beach, 29 Cal.2d 848 (1947)	16, 20
Lane Ltd. v. Larus & Bros. Co., 243 F.2d 364 (2nd Cir., 1957)	13, 14
Local 659 IATSE v. Color Corp. of America, 47 Cal.2d 189 (1956)	13, 14

Page

McCloskey v. Division of Labor Law Enforcement, 200 F.2d 402 (9th Cir., 1952) 16

Owens v. Press Publishing Co., 20 N.J. 537, 120 A.2d 442 (1956) 19

Public Ledger, In re, 161 F.2d 762 (3rd Cir., 1947) 16

Riess v. Murchison, 384 F.2d 927 (9th Cir., 1967) 14

Sears, Roebuck & Co. v. Blake, 123 F.Supp. 131, aff'd sub nom. Sears, Roebuck & Co. v. Metro Engravers, 245 F.2d 67 (9th Cir., 1956) 15

Skaggs v. City of Los Angeles, 43 Cal.2d 497 (1954) 19

Southern Pacific Co. v. Bogart, 250 U.S. 483 (1919) 15

Southwestern Electric Power Co. v. Local Union 738, IBEW, 293 F.2d 929 (5th Cir., 1961) .. 13

Teamsters Local Unions v. Braswell, 395 F.2d 655 (5th Cir., 1968) 13

Terry v. City of Berkeley, 41 Cal.2d 698 (1953) 16, 19

Thompson v. Iowa Beef Packers, Inc., 185 N.W. 2d 738 (1971) 15

United Steelworkers of America v. American Intl. Aluminum Co., 334 F.2d 147 (5th Cir., 1964) 13

U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971), 404 U.S. 820 (1971), 405 U.S. 228 (1972) 15

Vaca v. Sipes, 386 U.S. 171 (1967) 12

Rules

Rules of Supreme Court, Rule 19 3

Statutes — Page

California Labor Code, Sec. 200 16
California Labor Code, Sec. 218 16
88 Statutes at Large, p. 829 21
Employee Retirement Income Security Act of 1974, Sec. 2 21
Labor Management Relations Act of 1947, Sec. 301(a) 3, 4, 5
Labor Management Relations Act of 1947, Sec. 302(c)(5) 20
Labor Management Relations Act of 1947, Sec. 302(c)(6) 20
Public Law No. 93-406 21
United States Code, Title 28, Sec. 1254(1) 3
United States Code, Title 29, Sec. 151 20
United States Code, Title 29, Sec. 185(a) ..3, 4, 5
United States Code, Title 29, Sec. 201 20
United States Code, Title 29, Sec. 301 20
United States Code, Title 29, Sec. 302(c)(5) 20
United States Code, Title 29, Sec. 302(c)(6) 20
United States Code, Title 46, Sec. 496 15

No. .....

IN THE

Supreme Court of the United States

October Term, 1974

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC; *et al.*,
Petitioners,

vs.

THE HEARST CORPORATION, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the dismissal of petitioners' action against respondent for recovery of certain employment benefits in the nature of pension, retirement and severance pay.

The decision of the court of appeals is contained in an opinion issued in two companion cases, No. 73-1742 and No. 73-1838. The two appeals involved the same parties, arose out of the same events, and were argued and considered together. In No. 73-1742, the court ordered the parties to arbitrate the merits of the disputes. The court, in view of its decision in No. 73-1742 holding that any and all grievances be decided by an arbitrator, affirmed the dismissal of petitioners'

complaint herein for damages and other judicial relief in No. 73-1838. Respondent herein has filed a Petition for Writ of Certiorari with respect to the court's decision in the companion case, No. 73-1742 (Sup.Ct. No. 74-982).

As petitioners previously advised this Court in applying for an extension of time to file this petition, the instant petition would not have been filed if respondent Hearst had not filed the petition in No. 74-982. Petitioners' principal objective in the instant litigation is to obtain a hearing on the merits of their claims in either the arbitral or judicial forum as soon as possible and, in the words of the court of appeals, "get on with it." Although petitioners believe there are valid reasons for granting the petition herein, we would be satisfied if certiorari were denied in both cases and it was therefore finally determined that petitioners' case on the merits was to be heard in arbitration.

Accordingly, if Hearst's petition in No. 74-982 were to be denied, we would no longer urge the granting of the instant petition. On the other hand, if Hearst's petition in No. 74-982 were to be granted, there would be compelling reasons for granting the instant petition.

OPINIONS BELOW.

The opinion of the court of appeals, reported at 504 F.2d 636, is set forth in Appendix A hereto. The opinion and order of the district court, reported at 352 F.Supp. 1382, is set forth in Appendix B hereto.

JURISDICTION.

The judgment of the court of appeals was entered on October 4, 1974, affirming the dismissal of petitioners' action which arose under Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a). On December 18, 1974, Mr. Justice Douglas issued an order granting petitioners an extension of time to and including March 3, 1975, within which to file a Petition for Writ of Certiorari. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), and in accordance with Supreme Court Rule 19.

QUESTIONS PRESENTED.

1. Is arbitration the exclusive remedy available to one of the parties to a collective bargaining agreement when the other party to the agreement has repudiated the agreement and the arbitration provisions thereof and has refused to arbitrate the dispute or to participate in the selection of an arbitrator or recognize the jurisdiction of an arbitrator to hear the dispute?
2. When a party to a collective bargaining agreement repudiates the agreement and the arbitration provisions thereof, refuses to arbitrate a dispute or to participate in the selection of an arbitrator, and refuses to recognize the jurisdiction of an arbitrator to hear the dispute, is that party estopped from later claiming that arbitration is the exclusive remedy available to the other party to the agreement?

3. Does the existence of an arbitration provision in a collective bargaining agreement preclude an employee from exercising his right to sue his employer for wages due and payable under the provisions of a state labor code?
4. Does the existence of an arbitration provision in a collective bargaining agreement preclude retired employees and the beneficiaries of deceased employees from bringing an action in a court of law to recover vested benefits in the nature of pensions, retirement benefits, and severance pay?
5. Would the forfeiture of vested retirement and severance pay benefits by employees, without a hearing and determination on the merits of their claims, violate public policy?

STATUTE INVOLVED.

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE.

The complaint in the instant case was for breach of contract, for recovery of unpaid wages, for declaratory relief, for declaration of a constructive trust, and for work and labor performed and money had and received. The petition in the companion case was to

vacate an arbitration award. Federal jurisdiction was based on Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a).

There is no substantial dispute as to the material facts, most of which were stipulated by the parties.

Petitioners, plaintiffs below, sought recovery of certain vested and earned retirement and severance pay benefits (denominated "alternate benefits" and "dismissal pay") provided for in a series of collective bargaining agreements between respondent and petitioner Los Angeles Newspaper Guild, Local 69 ("the Guild"), and sought various declarations of their rights to receive these benefits and of their rights to judicial relief.

Petitioners, other than the Guild, fall into four categories: (1) former employees of respondent Hearst who retired after reaching the age of 65 or after completing 25 years of service or after becoming permanently incapacitated; (2) the beneficiaries of deceased former employees of respondent Hearst; (3) a class of employees of respondent Hearst who have reached the age of 65 or completed 25 years of service but have not yet retired; and (4) a class of employees of respondent Hearst who have not yet reached the age of 65 or completed 25 years of service.

Under the provisions of a series of collective bargaining agreements between the Guild and respondent Hearst, the first of which was entered into in 1939 and the most recent of which was entered into on January 28, 1966, employees who reached the age of 65 or who completed 25 years of service or who became permanently incapacitated were entitled to receive, upon their resignation, a cash lump sum payment based

upon their years of service. Similarly, employees who had completed six months of service were to receive, in the event of dismissal, a cash lump sum payment based upon years of service, and the beneficiaries of deceased employees with six months or more of service were also to receive such a payment upon the death of said employees. The collective bargaining agreements also contained a provision for arbitration of grievances.

In October, 1967 defendant and the Guild began negotiations for new agreements. These negotiations have continued to date without success. On December 15, 1967, because of the inability of the parties to reach agreement on a new contract, the Guild called a strike against Hearst, which has also continued to date.

After December 15, 1967, Hearst consistently refused to pay all claims for alternate benefits and dismissal pay, consistently denied that the agreements were applicable or of any force or effect or that it had any duties or obligations under the agreements or any duties or obligations to pay any alternate benefits or dismissal pay benefits, consistently maintained that the arbitration provisions of the agreements were not applicable or in effect, and consistently refused to arbitrate the disputes or proceed to the selection of an arbitrator.

From March, 1968 through August, 1968, during meetings between the parties and in frequent correspondence between the parties, the Guild attempted to convince Hearst to pay the claims, filed grievances over Hearst's refusal to do so and, on several occasions, requested arbitration of the disputes and asked Hearst to participate in the selection of an arbitrator. Hearst consistently rejected the claims, maintained that

the agreements, and the alternate benefits, dismissal pay and arbitration provisions thereof were no longer applicable or in effect, contended that it had no obligations under the agreements, refused to arbitrate the dispute and refused to participate in the selection of an arbitrator.

In late 1968, a number of members of the Guild attempted to enforce their claims through the office of the Labor Commissioner of the State of California under the provisions of the Labor Code of the State of California. The Labor Commissioner held in favor of the claimants and demanded payment from Hearst, but Hearst failed to comply with the demand. Thereafter, the Labor Commissioner advised the Guild, first, that he would attempt to have a criminal complaint issued against Hearst, and later, that he would attempt to pursue a civil action against Hearst. Finally, the Labor Commissioner declined to take any action against Hearst on the ground that the claimants had an available remedy through arbitration and, on May 12, 1969, reassigned the claims to the claimants.

Thereafter, the Guild wrote to Hearst in another effort to obtain Hearst's agreement either to pay the benefits or proceed to arbitration. Hearst responded by reiterating its position that neither the agreements nor the alternate benefits, dismissal pay or grievance-arbitration provisions thereof were applicable or in effect. Hearst offered to meet concerning the subject matter of the claims, but advised the Guild "we will not meet with you for the purpose of selecting an impartial arbitrator or otherwise proceeding to arbitration." A meeting was held on August 27, 1969, at which time Hearst again repudiated the agreements and the alternate benefits, dismissal pay and arbitration provisions

thereof, refused to pay the claims, and refused to select an arbitrator or otherwise proceed to arbitration.

On October 3, 1969, the Guild wrote to the American Arbitration Association ("AAA") and asked it to appoint an arbitrator pursuant to its rules. On October 8, 1969, in disregard of and noncompliance with its own rules, the AAA purported to appoint Thomas T. Roberts to hear the dispute. In purporting to appoint Roberts, the AAA gave no prior notification to the parties, failed to first submit a list of possible arbitrators to either party for selection or rejection of particular arbitrators, and failed to permit Hearst an opportunity to file an answering statement to the Guild request prior to the appointment of an arbitrator, all as required by the AAA rules.

On November 11, 1969, Roberts wrote each party advising that he had calendared a threshold proceeding for February 3, 1970, to discuss issues relating to the viability of the grievance, the propriety of arbitration, the procedure to be followed and his jurisdiction. Roberts stated further, however, that "any appearance on that date will not constitute a recognition of my jurisdiction nor will it be deemed a waiver of available defenses relating to a lack of arbitrability."

On January 12, 1970, Hearst responded, advising Roberts of its position that the matter was not arbitrable because the collective bargaining agreements had expired prior to accrual of the claims and prior to any demand for payment or arbitration, and because the AAA's rules "are inapposite, and in any event have not been complied with". The letter continued:

> "Since we have been invited, we anticipate being present at the hearings; however, our presence is not a recognition of your jurisdiction nor a general

> or special appearance. Any participation on our part at those hearings should not be considered as a general appearance, special appearance, nor recognition of your jurisdiction; or is it in any way whatsoever a waiver of our stated position that this matter is not arbitrable. The Herald-Examiner's involvement in this arbitration should not be construed as a relinquishment of its right and intention to proceed before any appropriate tribunal to vindicate its position that this matter is not arbitrable."

At the outset of the meeting on February 3, 1970, Hearst reiterated its position as set forth in its January 12, 1970 letter, again stating that its participation was neither a general nor a special appearance and should not be construed in any way as a waiver of its position that the matter was not arbitrable. Then, for the first time, Hearst contended that the matter was not arbitrable because the Guild allegedly had not made a timely request to the AAA for appointment of an arbitrator. After a short discussion of the proposed agenda for the meeting, the arbitrator, Roberts, interrupted to make clear the basis upon which the proceeding was being conducted:

> "Let's consider another problem now before we go any deeper into this question. It should be clearly stated on the record that the Guild understands that if we go forward this morning regarding anything that the company is not making a special appearance, a general appearance or a half-way between appearance."

The proceeding then continued; the sole matter on which testimony and argument was received being the alleged failure of the Guild timely to request the AAA

to appoint an arbitrator under Article VII of the agreements, which provided that if an arbitrator was not selected by mutual agreement of the parties "the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator pursuant to the present rules" of the AAA. Article VII contained specific time limits for each step of the grievance procedure except this final step providing for a unilateral request to the AAA. As to this step, the agreement set forth no time limit.

On August 12, 1970, Arbitrator Roberts rendered his purported Findings and Award. Therein, he specifically limited his inquiry to "the narrow issue of whether or not the Guild sought the appointment of an arbitrator in a timely manner." Rejecting laches concepts, and instead purporting to insert into the agreement a "statute of limitations", the arbitrator concluded that the Guild had not applied to the AAA for appointment of an arbitrator in a timely manner.

On September 3, 1970, the Guild wrote to Hearst and advised it that the Guild rejected Roberts' purported "Findings and Award" and considered them null and void and not binding on the Guild. The Guild renewed its demand for payment of alternate benefits and dismissal pay.

On September 9, 1970, Hearst replied to the Guild letter of September 3, 1970, and rejected the Guild's demand for payment of alternate benefits and dis-

missal pay. Hearst further stated that it was its position that Roberts' purported award had settled Hearst's liability.

The Guild thereafter filed the instant action and a petition to vacate the purported award.

The district court vacated the purported arbitration award and ordered the parties to submit the dispute to the grievance procedure and, if necessary, to arbitration. The district court also dismissed petitioners' complaint on the ground that arbitration was the exclusive remedy.

The court of appeals affirmed the district court's decision vacating the award on a number of grounds and modified the judgment by ordering the parties to proceed directly to arbitration. The court of appeals, in view of its decision ordering arbitration, affirmed the district court's dismissal of petitioners' complaint.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Principle Set Forth in Vaca v. Sipes, 386 U.S. 171 (1967) and in Decisions in Various Circuits That Arbitration Is Not the Exclusive Remedy When a Party Has Repudiated the Agreement or the Arbitral Remedy.

The court of appeals apparently concluded that since it was ordering arbitration of the disputes, it was unnecessary to determine whether petitioners also had a right to proceed with a judicial action for damages and other relief, and therefore affirmed the dismissal of petitioners' complaint. This holding disregards the principle established in other circuits and set forth by this Court in *Vaca v. Sipes,* 386 U.S. 171 (1967) that once one party to an arbitration agreement repudiates that agreement, the other party to the agreement has the option of compelling arbitration or of filing an action in a court of law and proceeding to a judgment on the merits in that forum.

While recognizing that arbitration is the exclusive remedy in some situations, this court in *Vaca v. Sipes, supra,* at page 185, stated:

> "An obvious situation in which the employee should not be limited to the exclusive remedial procedure established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures."

This principle has been previously expressed in labor arbitration cases in the Court of Appeals for the Fifth

Circuit and the California Supreme Court. *Southwestern Electric Power Co. v. Local Union 738, IBEW*, 293 F.2d 929 (5th Cir., 1961); *Intl. Assn. of Machinists v. Hayes Corp.*, 296 F.2d 238, 243-245 (5th Cir., 1961); *United Steelworkers of America v. American Intl. Aluminum Co.*, 334 F.2d 147, 150 (5th Cir., 1964); *Teamsters Local Unions v. Braswell*, 395 F.2d 655 (5th Cir., 1968); *Local 659 IATSE v. Color Corp. of America*, 47 Cal.2d 189 (1956). The Court of Appeals for the Second Circuit has applied the same principle in a commercial arbitration case. *Lane Ltd. v. Larus & Bros. Co.*, 243 F.2d 364 (2nd Cir., 1957).

Although the court of appeals failed to afford petitioners the alternative remedy to which they were entitled, there can be no question from a reading of the court's opinion and based upon the undisputed facts herein that a clear, unequivocal repudiation of arbitration occurred. Thus, Hearst repeatedly denied the existence or applicability of the collective bargaining agreements, denied that it had any obligations under the agreements, refused to arbitrate or proceed to the selection of an arbitrator, insisted that it was entitled to a judicial determination of the disputes, and refused to recognize the jurisdiction of the arbitrator. Far more equivocal conduct than that involved herein has been held by both federal and California state courts to constitute repudiation. *Southwestern Electrical Power Co. v. Local 738, IBEW*, 293 F.2d 929, 932 (5th Cir., 1961); *Lane, Ltd. v. Larus Bros. & Co.*, 243 F.2d

364, 367 (2nd Cir., 1957); *Riess v. Murchison*, 384 F.2d 927 (9th Cir., 1967); *Local 659, IATSE v. Color Corp. of America*, 47 Cal.2d 189 (1956).

It is difficult to imagine a clearer, more unequivocal repudiation of arbitration than that which occurred in the instant case.*

The court of appeals' failure to afford petitioners the option of pursuing judicial remedies thus is in direct conflict with decisions of other circuit courts and with the principle set forth by this court in *Vaca v. Sipes, supra,* that arbitration ceases to be the exclusive remedy available to a non-repudiating party after repudiation of the agreement or of the arbitral procedures by the other party.

In the instant situation, Hearst waived its right to raise arbitration as a defense to petitioners' lawsuit herein and was estopped from doing so. Petitioners were thus entitled to the option of proceeding with the instant lawsuit on the merits of their claims even though the judgment of the court of appeals affirming their right to arbitration was correct.**

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*Hearst's argument below that it could not repudiate the arbitration provision herein because of the existence in such provision of *ex parte* procedures for the appointment of an arbitrator is fallacious, since Hearst, in repudiating the entire agreement, including the arbitral provisions thereof, obviously repudiated the *ex parte* procedures contained therein. Moreover, the mere fact that a party may have remedies with respect to a repudiation does not make it any the less a repudiation.

**The Guild's attempted pursuit of arbitration through the AAA which resulted in the purported award on timeliness in no way affects the rights of petitioners herein to pursue their judicial remedy. Since Hearst's repudiation gave petitioners alternative remedies, *i.e.*, arbitration or a lawsuit, petitioners could not be deprived of the latter remedy by their attempt to pursue arbitration in these circumstances where, *inter alia*, there was no consideration or determination on the merits.

2. The Decision of the Court of Appeals Conflicts in Principle With U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971) Which Holds That Arbitration Is Not the Exclusive Remedy With Respect to Wage Claims of Seamen Asserting Their Statutory Remedies.

In *U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351 (1971), this Court held that arbitration was not the exclusive remedy available to a seaman seeking to enforce a claim for wages under 46 U.S.C. Section 496, which afforded him a statutory remedy for such claims.

The Supreme Court of Iowa, in *Thompson v. Iowa Beef Packers, Inc.,* 185 N.W.2d 738 (1971) applied the principle of *Arguelles* to claims for overtime compensation under the Fair Labor Standards Act which could also have been processed as grievances under a collective bargaining agreement. This Court granted certiorari (404 U.S. 820 (1971)), but later dismissed it as improvidently granted (405 U.S. 228 (1972)-),

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It is well settled that there is no binding election of remedies unless the two remedies are inconsistent. If, as here, the remedies are consistent or concurrent, a party may first pursue one remedy and then another until he obtains satisfaction of his claim. *Fredericksen v. Renard,* 247 U.S. 207 (1918); *Bierce v. Hutchins,* 205 U.S. 340 (1907); *Henderson Tire & Rubber Co. v. Gregory,* 16 F.2d 589 (8th Cir., 1926).

Furthermore, a party who at first unsuccessfully pursues a remedy which he believes is available but which in fact is not, may thereafter pursue another remedy and obtain the appropriate relief. *Bierce v. Hutchins,* 205 U.S. 340 (1907); *Southern Pacific Co. v. Bogart,* 250 U.S. 483 (1919); *Sears, Roebuck & Co. v. Blake,* 123 F.Supp. 131, aff'd *sub nom. Sears, Roebuck & Co. v. Metro Engravers,* 245 F.2d 67 (9th Cir. 1956); *Agar v. Winslow,* 123 Cal. 589 (1899). In the instant case, even if Hearst's position were sustained with respect to Roberts' purported arbitration award, such a decision would mean only that the arbitral remedy was not available. The unavailability of that remedy would not preclude petitioners from exercising the alternative judicial remedy.

on the basis that the employee claim was based upon an alleged violation of the statute but the arbitration provision of the collective bargaining agreement encompassed only alleged violations of the agreement.

The instant case raises the issue of arbitration *vis-a-vis* a wage earner's statutory remedy in another context.

The State of California, like many states, has adopted a comprehensive labor code which provides for prompt and full payment of all wages due to employees, penalty wages in the event of failure to make timely payment of wages, and criminal sanctions in the event of willful violations. [Labor Code of the State of California, Section 200, *et seq.*] The California law recognizes the wage earner's right to sue in a court of law to enforce his statutory rights. [*Id.*, Section 218.]

The benefits involved in the instant case, being in the nature of deferred compensation for services and in the nature of pensions, retirement benefits or severance pay are clearly "wages" within the meaning of the California State Labor Code. See *Estate of Hollingsworth*, 37 Cal.App.2d 432, 436 (1940); *Division of Labor Law Enforcement v. Ryan Aeronautical Co.*, 106 Cal.App.2d 833 (1951); *Kern v. City of Long Beach*, 29 Cal.2d 848 (1947); *Terry v. City of Berkeley*, 41 Cal.2d 698 (1953). *Cf. McCloskey v. Division of Labor Law Enforcement*, 200 F.2d 402 (9th Cir., 1952); *In re Public Ledger*, 161 F.2d 762 (3rd Cir., 1947); *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir., 1948).

The decision of the court of appeals herein thus deprives petitioners of their right to enforce through the courts statutory wage claims against their employer under a California state statute which has been in ef-

fect since 1937. This decision conflicts in principle with *Arguelles, supra.* Moreover, since the California statute is typical of statutes in most states, the decision raises an important issue under the federal labor laws —whether the existence of arbitration as a remedy supersedes and bars employees from utilizing statutory remedies for the recovery of wages.

3. If Hearst's Petition for Writ of Certiorari With Respect to the Decision Below Ordering Arbitration (Sup.Ct. No. 74-982) Is Granted, the Instant Petition Should Also Be Granted.

As noted above, respondent herein has filed a Petition for Writ of Certiorari with respect to the decision of the court below ordering arbitration (Sup. Ct. No. 74-982). It is petitioners' position that respondent Hearst's petition is without merit and should be denied. Although petitioners believe, as argued above, that there are valid reasons for granting the petition herein even if Hearst's petition were denied, petitioners' main concern in the instant litigation has been and continues to be to obtain a hearing on the merits of their claims in one forum or the other. At issue here are retirement benefits for former employees of Hearst, many of whom are well in excess of 65 years of age. Petitioners agree with the court of appeals that "it is time to get on with it." Thus, petitioners would be satisfied if Hearst's petition were denied and they could be assured of a hearing on the merits in the arbitral forum. If Hearst's petition in No. 74-982 is denied, petitioners have no desire to further prolong this litigation in this Court. Accordingly, if Hearst's petition in No. 74-982 were denied, petitioners would no longer urge the granting of certiorari herein.

In the event, however, that Hearst's petition in No. 74-982 were to be granted, there would be additional compelling reason for also granting certiorari herein.

The two appeals were considered jointly by the court below. It is clear from the court's opinion that its decision to affirm the dismissal of petitioners' action herein was based upon its decision in the companion case ordering arbitration. The court apparently concluded that it was unnecessary to decide the issues herein in view of its decision ordering arbitration or that because the court had ordered arbitration petitioners were not entitled to proceed in court.

The court of appeals clearly intended to afford petitioners a hearing on the merits of their claims. Its affirmance of the dismissal herein was based upon its decision in the companion case ordering arbitration. Had arbitration not been ordered, the court might well have reached a contrary result in the instant case. Thus, if Hearst's petition in No. 74-982 is granted and the petition herein denied, petitioners might be deprived of the hearing on the merits which the court of appeals clearly intended them to have. Under such circumstances, denial of the petition herein might result in a final decision directly contrary to the result intended by the court of appeals.

Clearly, if the court's decision ordering arbitration is to be reviewed, its decision in the companion case refusing to permit a pursuit of judicial remedies because it had ordered arbitration should also be reviewed.

Additionally, if Hearst's petition in No. 74-982 were to be granted and the decision below reversed and if the petition herein were denied, petitioners would be

left with no remedy and with no hearing in any forum on the merits of their claims. Such a result would work a forfeiture of vested rights and, we respectfully submit, would be contrary to public policy.

We are dealing here not with an ordinary claim for breach of contract, but with a breach of contract arising out of an employer's willful refusal to pay its employees their retirement, death, disability and dismissal benefits. These are benefits accrued as a result of long years of service—in some cases even a lifetime —benefits for which the employees gave up wage and other increases in the reasonable expectation that when they retired, died, were disabled or dismissed, they or their families would have these savings at a time when they were most needed.

These benefits represent no small amount. The average retirement benefit is approximately $8,000 per person and approximately $400,000 in the aggregate for the named plaintiffs alone. The aggregate amount involved with respect to the other employees covered by the class actions herein is well in excess of that figure. To these working men and their families these benefits may represent their total savings. The retirement benefits involved herein, according to every authority found, are vested and are provided special protection by the law; perhaps most importantly, they are benefits to which, petitioners are clearly entitled. See *Owens v. Press Publishing Co.*, 20 N.J. 537, 120 A.2d 442 (1956); *Hercules Powder Co. v. Brookfield*, 189 Cal. 531, 53 S.E.2d 804 (1949); *Brooklin Eagle, Inc.*, 49 L.A. 147 (Arb. Willard Wirtz, 1959); *H. K. Porter Co.*, 49 L.A. 147 (Arb. Sidney L. Cahn, 1967); *c.f. Skaggs v. City of Los Angeles*, 43 Cal.2d 497 (1954); *Terry v. City of Berkeley*, 41 Cal.2d 698 (1953);

Kern v. City of Long Beach, 29 Cal.2d 848 (1947); *Hunter v. Sparling*, 87 Cal.App.2d 771 (1948).

The long-standing public policy of protecting employees from the loss of such benefits which they have earned by years of service is manifest.

Federal concern with protecting the rights of wage earners is clear from the provisions of the Labor Management Relations Act, 29 U.S.C. Section 151, *et. seq.*, which guarantee to employees the right to be represented for the purpose of collective bargaining, and the provisions of the Fair Labor Standards Act, 29 U.S.C. Section 201, *et seq.*, which guarantee the payment of minimum wages and overtime rates to employees. State statutes, such as the California Labor Code, similarly demonstrate the public concern that working men and women receive the wages which they have worked to earn.

Moreover, the wages involved herein are not ordinary wages; they have been earned and accrued over many years of labor and are retirement benefits in the nature of pensions. The rights to such benefits are particularly protected by law. *Gibson v. City of San Diego*, 25 Cal.2d 930 (1945).

Congressional concern regarding these types of benefits is obvious. Employee welfare and pension benefit plans have been subject to federal regulation for some time under the provisions of Section 302(c)(5) and (6) of the Labor Management Relations Act, 29 U.S.C. §302(c)(5) and (6) and under the provisions of 29 U.S.C. Section 301, *et seq.*

Federal concern over the administration of such benefit programs and over the losses suffered by employees who had worked for many years to accrue

retirement benefits with the expectation of being able to live with some dignity in their later years culminated last year in the adoption by Congress of the Employee Retirement Income Security Act of 1974, Public Law 93-406, 88 Stat. 829.

This recently-adopted Act is designed to prevent the very type of forfeiture which Hearst attempts to perpetrate herein. Section 2 of the Act, setting forth the Congressional findings and declaration of policy leave no doubt that a forfeiture of the benefits involved herein without even a hearing on the merits would be contrary to public policy.

Indeed, under the Employee Retirement Income Security Act of 1974, the type of benefits involved herein undoubtedly would have to be maintained in trust with a written trust instrument and named trustees. In this respect, it should be noted that one of petitioners' causes of action herein is for declaration of a constructive trust.

Throughout this litigation, petitioners' principal objective has been to have their "day in court" on the merits of these claims, in either a judicial or arbitral forum. Clearly, there is a strong public policy against a forfeiture of these vested rights. At the very least, petitioners are entitled to a hearing on the merits of their claims.

If Hearst's petition in No. 74-982 is denied, petitioners will be able to proceed to an arbitral hearing of their claims in accordance with the order of the court of appeal. However, if Hearst's petition in No. 74-982 were to be granted and the decision of the court of appeals ordering arbitration reversed, we respectfully submit that the public policy considera-

tions outlined above would require that petitioners be permitted to pursue their judicial remedies herein.

Nor are there any reasons why petitioners should be prevented from having a judicial hearing on the merits of their claims should they be deprived of such a hearing in the arbitral forum. Hearst might suggest that arbitration is what it bargained for and that arbitration therefore should be the exclusive remedy, but closer analysis of this contractual assertion shows its transparency. While it is possible that at the time the agreement was entered into, Hearst bargained for arbitration, it is clear that at the time this dispute arose, arbitration no longer had any value for Hearst; in fact, Hearst consistently refused to arbitrate and denied that the dispute was arbitrable.

Nor are the policy considerations which usually favor arbitration in labor relations applicable here. Arbitration is normally favored, by the parties and the courts, because it is a quick, inexpensive remedy which promotes industrial stability and labor peace and, by speedy resolution of disputes, avoids labor unrest and strikes. In the instant case, of course, the dispute arose at a time when a strike was already in active progress over the terms of a new labor agreement and at a time when arbitration could not possibly have prevented labor unrest. Obviously, under the circumstances of Hearst's repudiation herein, arbitration also could not and has not provided the quick, inexpensive consensual remedy favored by the courts.

Equity and public policy thus require that petitioners not forfeit these vested retirement benefits without even having had the merits of their case heard; if the claims cannot be raised in arbitration, petitioners respectfully

submit that they must be permitted to proceed with their court action herein.

Accordingly, if the petition in No. 74-982 is granted, certiorari should also be granted herein. If Hearst's petition in No. 74-982 is denied, petitioners herein do not urge the granting of the petition herein.

CONCLUSION.

For all of the foregoing reasons, it is respectfully urged that the petition herein be granted if the petition for writ of certiorari in No. 74-982 is granted.

Respectfully submitted,

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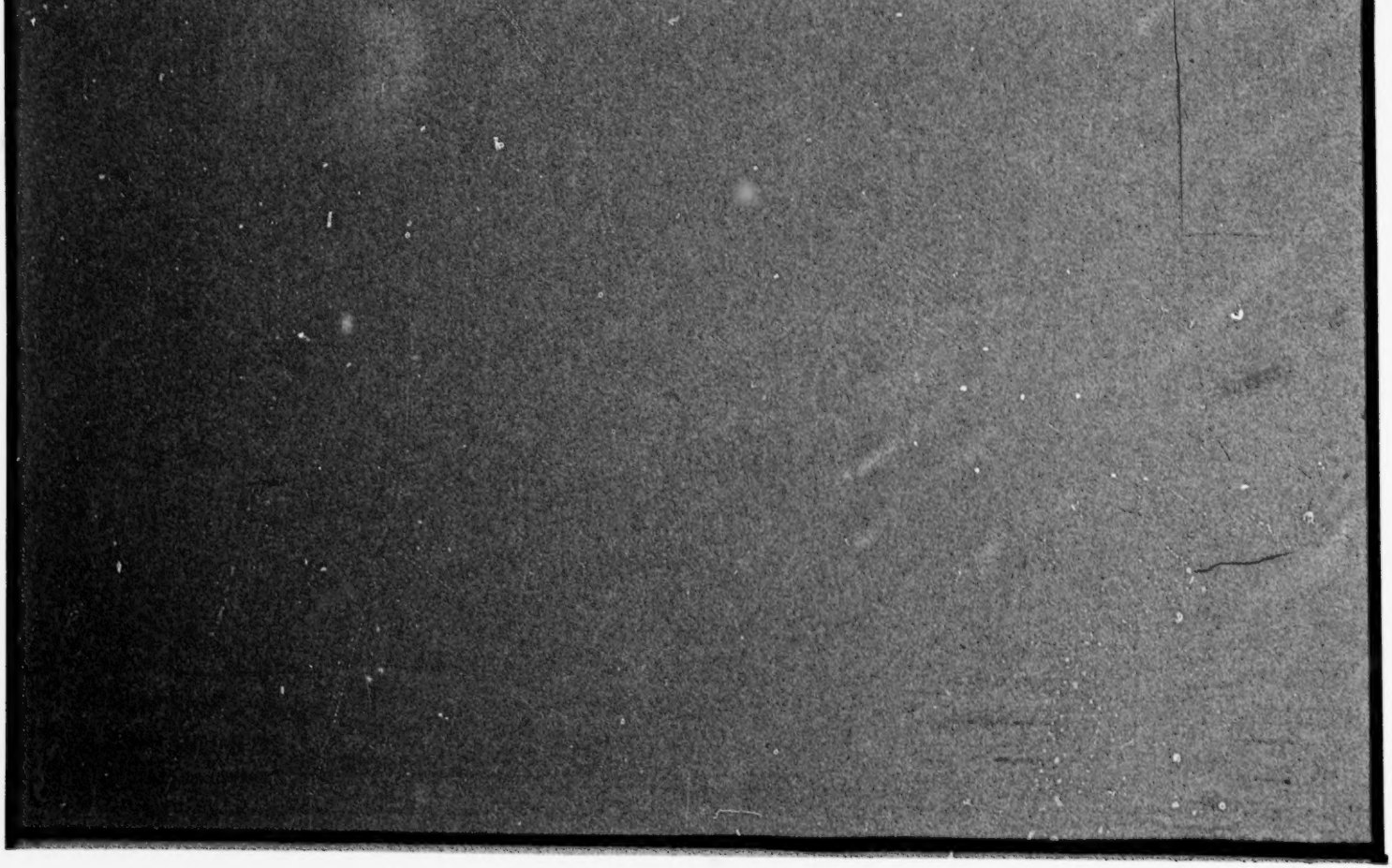
February 28, 1975.



APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE MATTER OF ARBITRATION BETWEEN LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, *Petitioner-Appellee,* *vs.* THE HEARST CORPORATION, a corporation, Los Angeles Herald-Examiner, a Division of The Hearst Corporation, and Hillbro Newspaper Printing Company, a Division of The Hearst Corporation, *Respondents-Appellants.*	)	No. 73-1742
		OPINION
LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, et al., *Plaintiffs-Appellants,* *vs.* THE HEARST CORPORATION, a corporation, *Defendant-Appellee.*	)	No. 73-1838

[October 4, 1974]

Appeal from the United States District Court for the Central District of California

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Before: MOORE,* WRIGHT and GOODWIN, Circuit Judges.

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*The Honorable Leonard P. Moore, Senior United States Circuit Judge, United States Court of Appeals for the Second District, sitting by designation.

MOORE, Circuit Judge:

Two appeals are presently before us. They involve the same subject matter, they arise out of the same facts and the opinions were written and judgments were directed to be entered by the same district judge (Hon. Robert J. Kelleher). The appeals will be considered and decided together.

The parties in "IN THE MATTER OF ARBITRATION BETWEEN LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, Petitioner-Appellee v. THE HEARST CORPORATION, a corporation, Los Angeles Herald-Examiner, a Division of The Hearst Corporation, and Hillbro Newspaper Printing Company, a Division of The Hearst Corporation, Respondents-Appellants" (No. 73-1742) are a group of employees of The Hearst Corporation or their beneficiaries represented collectively by Petitioner-Appellee, which will hereinafter be referred to as the "Guild." The Hearst Corporation, Respondents-Appellants, and its Divisions, publish, print and circulate a daily and Sunday newspaper, THE HERALD-EXAMINER, and will be referred to hereinafter as "Hearst."

The parties in "LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, et al., Plaintiffs-Appellants v. THE HEARST CORPORATION, a corporation, Defendant-Appellee" (No. 73-1838) are likewise the Guild and Hearst.

The controversies stem from the rights, if any, of Hearst and the Hearst employees under two collective bargaining agreements, which had been entered into on or about January 28, 1966, by the Guild on behalf of

the Hearst employees and Hearst. The agreements provided for wages, hours, working conditions, etc., covering the employees' employment. These agreements were but a continuation of similar employment agreements, containing comparable benefits, under which many of the employees had worked for a substantial number of years.

Two provisions of the agreement relating to compensation are critical to any decision adjudicating the employees' rights thereunder. Article XI, entitled "Alternate Benefits" declared that an employee, upon reaching the age of sixty-five (65), or upon the completion of twenty-five (25) years of service, would become entitled to receive from Hearst a cash lump sum payment based upon the number of years of his service to Hearst in accordance with a certain schedule set forth therein. To receive these payments, the employees, so desiring them, had to tender their resignations and request payment. Article IV, entitled "Dismissal Pay" (somewhat of a misnomer) provided for a cash lump sum payment to the beneficiary of any employee who died after more than six (6) months of service, the amount to be dependent on the period of service as set forth in a schedule in said Article.

No ambiguity is to be found in the terms of these Articles or in the prerequisites necessary to obtain the agreed-upon payments. To Hearst and the employees they were as much a part of wages as the weekly or monthly stipend. The following facts had to be shown for entitlement under Article XI, (1) age sixty-five years (65) or over or twenty-five years (25) years or more of service, (2) resignation tender, and (3) request for payment: under Article IV, two facts (1) death and (2) six (6) months or more of service. Just

as there is no ambiguity in terms, there should be no ambiguity as to performance. However, commencing in the Fall of 1967, a series of events caused this otherwise stable situation to suddenly be turned into a controversy which in bitterness and duration bids fair to rivalling the War of the Roses. For some seven years the war has raged but thus far only in a series of legal skirmishes, none of which has attacked the main issue, i.e., the rights, if any, of the employees and Hearst under the agreements. It may seem quite incongruous after seven years for the courts now to say that it is high time to resolve this issue expeditiously and with finality but since courts have been created for this purpose they should so act when the issue is presented in proper form.

A few background facts will suffice. In September 1967 the Guild notified Hearst and state and federal mediation services that it intended to terminate or modify the existing agreements which expired on December 15, 1967. In October 1967 negotiations for a new agreement[1] commenced. As of yet, however, no settlement has been reached. No agreement having been reached by December 15, 1967, the Guild called a strike against Hearst, which has continued to date. However, the last seven years have not been uneventful for Hearst and the Guild.

Subsequent to December 15, 1967, employees who had reached the age of sixty-five (65) or had completed twenty-five (25) years of service, tendered their

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[1]Reference is occasionally made to "agreement" and to "agreements." Those words apply to the agreement which existed between Hearst, its employees and the Guild, covering the employees' employment and Hearst's obligations to them, and which defines the rights of the parties now before this Court.

resignations and requested the payments specified in the agreements, the beneficiaries of deceased employees also requested the provided-for payments. To these requests Hearst replied that the agreements were no longer in effect and accordingly rejected them, and refused to make the specified payments. Then followed a protracted series of meetings between Hearst and the Guild to discuss the matter with Hearst remaining adamant in its position that the agreements no longer applied.

At this stage must be discussed Article VII of the agreements which provides for amicable settlement (a hoped-for desideratum) of "all grievances arising under this Agreement" (Article VII, SECTION 1). For this purpose, Grievance Committees were to be established by both the Guild and Hearst, certain formalities for the submission of grievances were set forth and in the event that arbitration was requested "the parties shall meet to select an arbitrator to whom the grievance of the complaining party shall be submitted for final decision." (Article VII, Section 3A).

Of particular significance to the litigations before us is the following paragraph:

> B. If such an arbitrator is not selected, or the party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator, or if for any other reason an arbitrator is not selected or secured within the aforesaid five (5) day period, then the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator pursuant to the present rules of the voluntary labor arbitration tribunal of the Ameri-

> can Arbitration Association, and the grievance shall be submitted to such arbitrator for final decision.

Although meetings between the Guild and Hearst were held during the Spring of 1968, Hearst did not alter its position that the agreements were not in effect. Finally, on June 19, 1968, the Guild by letter demanded arbitration "of the grievances raised by its letter of March 27, 1968, relating to Hearst's refusal to pay alternate benefits" and requested by letter a meeting to select an arbitrator. This demand for arbitration was rejected by Hearst on the specific ground "that it arises out of events subsequent to the expiration of the Guild's collective bargaining agreement . . ." Thereafter, the Guild continued to submit grievances because of Hearst's refusal to pay and continued to demand arbitration. Hearst's rejection of both demands was based upon the same grounds above specified.

At this point must be mentioned a diversionary maneuver in which the employees and the Guild engaged. Apparently feeling thwarted in their efforts to obtain payments from Hearst, they turned to the State Labor Commissioner, Division of Labor Law Enforcement of the State of California, by assigning to the State for collection their claims against Hearst. Hearings on the claims were held in the Fall and Winter of 1968 at which Hearst maintained its position that the agreements were no longer in effect.

The Commissioner found that Hearst owed the sums claimed and demanded payment of Hearst. Unable to collect from Hearst, the Commissioner attempted to file a criminal complaint against Hearst through the City Attorney of Los Angeles. The City Attorney refused

to issue a criminal complaint because a contract issue was involved, and the Labor Commissioner, asserting that the claimants had a contract remedy through arbitration, refused to pursue a civil action. Thus, more than six months of time were wasted, and the claimants were still without their benefits.

All during this period (1968-1969) negotiations (so-called) were taking place between Hearst and the Guild, at which the Guild demanded payment and arbitration and Hearst rejected both.

Suspicious that the Guild might request *ex parte* arbitration, Hearst in writing warned the American Arbitration Association (AAA) that there was no agreement in effect and that any request to appoint an arbitrator would be invalid.

Meetings, however, continued to the end of August 1969 without tangible results. Finally, on October 3, 1969, the Guild by letter requested the appointment of an arbitrator pursuant to AAA rules. In disregard of, and in non-compliance with, its own rules, the AAA on or about October 8, 1969, appointed Thomas T. Roberts as the Arbitrator. The Arbitrator advised the Guild and Hearst that on February 3, 1970, he would hold a hearing which would relate in particular "to the viability of the grievance, the propriety of arbitration, the procedure to be followed if there is to be an arbitration and, of course, my jurisdiction."

The Arbitrator so circumscribed his role as to make the proceeding before him a legal nullity. Thus, in his initial letter to the parties he wrote: "It should be clear that any appearance before me on February 3, 1970, will be in the nature of a 'special appearance.' More specifically, any appearance on that date will not con-

stitute a recognition of my jurisdiction nor will it be deemed a waiver of available defenses relating to a lack of arbitrability."

Hearst, to be doubly sure that its physical presence at any hearing would not be a waiver of its position that the matter was not arbitrable, specifically stated by letter that its participation "should not be considered as a general appearance, special appearance, nor a recognition of your jurisdiction; . . ." Furthermore, Hearst stated that its "involvement in this arbitration should not be construed as a relinquishment of its right and intention to proceed before any appropriate tribunal to vindicate its position that this matter is not arbitrable."

At the hearing itself on February 3, 1970, Hearst reiterated this position and added the ground that the matter was not arbitrable because the Guild had not made a timely request for the appointment of an arbitrator. To this statement the Arbitrator responded "that the Guild [should] understand that if we go forward this morning regarding anything that the company [Hearst] is not making a special appearance, a general appearance or a half-way between appearance." At this and the only hearing, the issue was restricted to the timeliness of the Guild's request for the appointment of an arbitrator. No testimony was presented as to the merits of the employees' claims.

On August 12, 1970, the Arbitrator rendered Findings and Award. He addressed himself to none of the claims or grievances filed by the employees except as he said that the grievances filed under the January 28, 1966 agreement were "not arbitrable because of the failure of the Guild to cause the appointment of an arbitrator in a timely manner as required by Article VII

of the said agreement." Thus, he challenged, *sua sponte*, his own appointment by the AAA and, by creating a quasi statute of limitations not in the agreement, decided that the grievances were not arbitrable—in other words, he rejected his jurisdiction to pass upon the asserted grievances.

Frustrated by the California Labor Commission to obtain such benefits to which they may be entitled under the agreement and by the holding of the Arbitrator that their claims were not arbitrable, the beneficiaries under the agreements turned to the courts for relief.

On November 18, 1970, the Guild filed a petition to vacate the so-called Arbitrator's award. The Guild also filed an action against Hearst in the district court for breach of contract, unpaid wages, work and labor performed, money had and received and for certain declaratory relief.

Both actions came on for trial and decision before the Honorable Robert J. Kelleher, *Judge*. Decisions in each action were rendered under date of January 10, 1973. From the decision (Appeal No. 73-1742) vacating the so-called arbitration award and directing that arbitration proceed on the merits, Hearst appeals. From the decision (Appeal No. 73-1838) dismissing the breach of contract, etc., action on the ground that arbitration is the exclusive remedy under the agreement, the Guild appeals. These appeals will be considered on a composite basis because it would seem that together they present all questions of law and fact pertinent to a resolution of the respective rights of the parties.

So many questions of law and fact have been raised that some sifting analysis may well be made at the out-

set. The primary and initial question to be solved is: is the agreement in effect so as to control the rights of the parties thereto and, if in effect, what are those rights? Hearst claims that it is not and that it ceased to be operative either after its expiry date or because of the Guild's strike on December 15, 1967. The Guild, in turn, claims that the agreement was a wage contract; that the rights of the employees to the payments therein provided for became vested; and that these were not destroyed by the failure to negotiate a new contract or by strike. Subsidiary to this question is whether there is a difference between employees whose rights ripened on or before December 15, 1967, and those whose rights ripened thereafter. But all important is *who* is to determine whether the agreement was in effect so as to create these rights because, if there be no enforceable agreement, no rights substantive or procedural flow therefrom. The choice would appear to be limited to the courts, an arbitrator or possibly both.

The issue is not without its complexities. As the District Court pointed out in its opinion (Arbitration vacatur case) "Hearst did '. . . not intend to relinquish its right to have this question of arbitrability resolved in any appropriate court tribunal.'" (Arbitration Proceedings' Transcript at 7.) The Court also referred to a pre-trial statement by Hearst's counsel that first, the Court had "to find that the basic underlying dispute is arbitrable. That is the duty of the Court." (Tr. Oct. 21, 1971, at 88). Although this comment may be somewhat ambiguous, i.e., is the agreement in effect and operative and is the dispute arbitrable thereunder, it is clarified by the Court's making a "judicial determination" and adjudging that "The contract between the parties, so far as it provides for amicable settlement

or arbitration of disputes, is in full force and effect." and that "the grievances initiated by the Guild, based on Articles IV and XI of the collective bargaining agreements are properly arbitrable under those agreements;." The Court kept open the opportunity for amicable settlement by ordering that the Guild and Hearst "proceed to adjust their dispute as provided in Article VII of their agreements." However, if such a settlement were not reached as contemplated in sections 1 and 2 of said Article, "the parties shall have the right to proceed to have arbitrated the merits of the disputes as provided in section 3 of Article VII of their agreement."

The Conclusions of Law give direction to the judgment. The Court concluded that "the existence of an agreement to arbitrate a particular dispute is a matter for the Courts to decide"; that Hearst had not relinquished its right to have this issue judicially determined; that the issue of substantive arbitrability not having been determined, the Guild was precluded from unilateral initiation of arbitration; that the Arbitrator's award on procedural issues was of no effect and should be vacated. Of particular importance are the conclusions that the agreements are in full force and effect; that the grievance and arbitration provisions "cover the alternate benefits and dismissal pay disputes" and that Hearst is bound to resolve the grievances in the manner provided by the agreements; and that the parties must proceed to adjust their dispute as provided in Article VII. A judgment to this effect was ordered.

The Court, thus, clearly answered the question: was the agreement in effect. Obviously in its opinion neither expiry date nor strike had destroyed its contractual

obligations. All that remains is to determine the respective rights of the parties thereto.

On appeal (the award vacatur appeal) Hearst argues in substance that the Guild, by appearing before the Arbitrator on February 3, 1970, and litigating the procedural issue of timeliness in seeking arbitration, is bound by the award which is subject to only a limited judicial review which review does not include examining the Arbitrator's determination that the Guild delayed unreasonably in appealing to the AAA and that the Arbitrator could decide *sua sponte* whether he could limit himself solely to the issue of the propriety of his appointment.

Our function on appeal is to pass upon alleged errors in the District Court's opinions. Vacatur of the so-called award is the ultimate issue in No. 73-1742.

The award should be vacated. The parties made their agreement under which the Guild employees worked and Hearst received the benefits of their services. The employees' right under Articles XI and IV were an important part of their contract. For over two years Hearst rejected all demands for recognition of the employees' claims and for arbitration on the theory that no agreement was in effect. Nevertheless negotiations of sorts were continuing during that period. When finally on October 3, 1970, the Guild was driven to seek unilateral arbitration, the AAA in non-conformity with its own rules appointed Arbitrator Roberts. The record discloses no facts upon which a claim of lack of timeliness can be sustained even if this had been the grievance contemplated by the agreement. All during this period it was Hearst and not the Guild which refused to recognize any duty to arbitrate.

We turn now to the Guild's action for breach of contract, etc. (Appeal No. 73-1838). The District Court dismissed this action "[s]ince arbitration is the exclusive remedy, an action for damages in breach of contract will not lie." The Court relied on the so-called trilogy[2] as enunciating a national policy of settling labor disputes by arbitration. On this appeal Hearst, despite its repeated proclamations that no agreement was in effect, supports the District Court's position that the Guild's sole remedy through "the Arbitral Process Provided for by the Collective Bargaining Agreement." It claims that the Guild had the right to proceed *ex parte* to arbitration. But even in this endeavor the Guild was frustrated by Hearst's refusal to recognize the agreement and to appear, and by the Arbitrator's acceptance of that refusal. In view of our decision affirming the District Court's vacatur decision No. 73-1742, it is unnecessary to consider what the effect of a decision might have been against a "company [(Hearst) that] is not making a special appearance, a general appearance or a half-way between appearance."

While there is no doubt that arbitration is the favored path to the solution of labor disputes, there still remains to the courts the duty to oversee the arbitral process to ensure that the parties receive the arbitration that they bargained for. Thus, in this case the Court had jurisdiction to determine arbitrability and then to compel arbitration, *IUOE Local 150 v. Flair Builders, Inc.*, 405 U.S. 487 (1972). But this super-

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[2]*United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

visory function is a far cry from that of an arbitrator taking into his own hands the timeliness of his own appointment, a matter quite *dehors* the agreement and parenthetically quite unsupported by the facts.

It might well be that Hearst's repudiation of the agreement would have given the Guild the right to obtain a judicial determination of its rights on the theory of breach of contract. But after seven years, it is time that the merits of the controversy be decided. The question is should decision be by court or by arbitrator? Even if arbitration be not the exclusive remedy, it is the remedy for which the parties contracted and which the District Court has decreed to be the proper road to follow.

Both parties have cited hosts of cases dealing with the labor problems of other companies under other circumstances. Most of them stand for the proposition that arbitration is to be favored for a solution of labor disputes as indeed it should be if the subject matter of the disputes is put fairly before the arbitrator.

However, this court is not called upon to debate the wisdom of other decisions upon other facts. Our task is to decide the relief which should be granted upon the specific facts before us. Accordingly, we affirm the judgments of the District Court in both appeals except with one slight modification. The seven years have produced no signs of amicable settlement. No benefit will come to either party by continuing their deadlock. In colloquial terms, it is time to get on with it. Therefore, the judgment in No. 73-1742 is modified to the extent that the parties shall have the right to proceed to have the merits of their disputes arbitrated; that either party, or both, may forthwith request the American Arbitration Association to cause the appointment

of an arbitrator who shall be appointed in accordance with its rules; that the arbitrator shall hear and determine the rights of the parties under the agreement including the alternate and dismissal pay benefits and any other issues properly before him; and that such appointment, hearings and determination be made as expeditiously as possible.

No. 73-1838

In view of our decision with respect to No. 73-1742 holding that any and all grievances properly cognizable under the Hearst-Guild collective bargaining agreement be decided by an arbitrator, the judgment in No. 73-1838 is affirmed.

APPENDIX B.

Memorandum of Opinion and Order.

IN THE UNITED STATES DISTRICT COURT, FOR THE CENTRAL DISTRICT OF CALIFORNIA.

LOS ANGELES NEWSPAPER GUILD, et al., Plaintiffs v. THE HEARST CORPORATION, Defendant. Civil No. 71-21-1—RJK.

Filed: January 10, 1973.

By this action plaintiffs seek recovery of alleged dismissal pay and alternative pay benefits under two written collective bargaining agreements. Declaratory relief, a declaration of rights and other equitable relief are also sought, together with certain claims for money damages for failure to honor the collective bargaining agreements.

Jurisdiction of this Court is based upon Section 301 of the Labor-Management Relations Act of 1947, as amended, (29 U.S.C.A. § 185(a)).

The dispositive issue of law is whether arbitration as provided for in the collective bargaining agreements is the exclusive remedy available to the plaintiffs. The Court finds that it is.

Article VII of the collective bargaining agreements between the Los Angeles Herald-Examiner and the Los Angeles Newspaper Guild and the Hillbro Newspaper Printing Company and the Los Angeles Newspaper Guild provide for adjustment of disputes. Section 3 is as follows:

> "A grievance raised under Section 2 above, must be resolved, dismissed or submitted to arbitration within sixty (60) days following receipt of the written notice provided for in Section 2 above. . . ."

Clearly, this language demonstrates that the parties to these two agreements intended arbitration to be the exclusive remedy failing resolution of disputes by the grievance committees.

The trilogy, *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), enunciated the settlement of labor disputes by arbitration as a national policy. If by contract disputes which cannot be resolved amicably are to be either dismissed or settled by arbitration, then "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement." *United Steelworkers of America v. American Mfg. Co., supra*, at 567.

Since arbitration is the exclusive remedy, an action for damages in breach of contract will not lie. Accordingly, this action is hereby dismissed and judgment rendered in favor of the defendants.

Disposition on the ground that arbitration is the exclusive remedy under the collective bargaining agreement precludes consideration of the other issues presented.

Counsel for defendants will prepare, serve and lodge an appropriate judgment pursuant to Local Rule 7.

Dated: January 10, 1973.

/s/ Robert J. Kelleher
Robert J. Kelleher
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-832

THE HEARST CORPORATION and its Division, LOS ANGELES HERALD-EXAMINER and HILLBRO NEWSPAPER PRINTING COMPANY,

Petitioners,

vs.

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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SUBJECT INDEX

Page

Opinions Below 1

Counterstatement of the Case 2

Reasons for Denying the Writ 10

1. The Decision of the Court of Appeals Is Based Upon the Complex, Unusual and Unique Facts of the Instant Case and Raises No Substantial Issue of Federal Labor Law 10

2. The Decision of the Court of Appeals Was Based Upon a Number of Independent Grounds, Each of Which Justified the Decision Reached, and None of Which Raises an Issue Warranting Review by This Court 12

   A. The Conclusion of the Court of Appeals That the AAA Failed to Comply With Its Rules in the Purported Appointment of the Arbitrator Was Correct and Raises No Substantial Issue Warranting Review by This Court 13

   B. The Conclusion of the Court of Appeals That "The Arbitrator so Circumscribed His Role as to Make the Proceedings Before Him a Legal Nullity" Was Correct and Raises No Substantial Issue Warranting Review by This Court 16

   C. The Court of Appeals' Conclusion That the Record Contains No Facts Upon Which a Claim of Lack of Timeliness Can Be Sustained Was Correct, Justified Vacating the Award on the

Page

Ground That It Was Not Based on the Essence of the Agreement and Raises No Substantial Issue Warranting Review by This Court 18

3. The Decision Below Does Not Conflict With John Wiley & Sons v. Livingston, 376 U.S. 543 23

4. The Decision Below Does Not Conflict With United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, or With the Decisions of Other Circuits Holding That an Arbitration Award Is to Be Vacated When It Fails to Draw Its Essence From the Agreement and Does Not Raise Any Substantial Issue Warranting Review by This Court 26

5. The Decision Below Does Not Nullify Ex Parte Arbitration and Does Not Frustrate the National Labor Policy of Favoring Arbitration as the Method for Settling Disputes 29

Conclusion 31

TABLE OF AUTHORITIES CITED

Cases	Page
Anaconda Co. v. Smeltermen's Union No. 16, 402 F.2d 749 (9th Cir., 1968)	28
Bertero v. Superior Court, 216 Cal.App.2d 213 (2d Dist., 1963)	22
Bethlehem Mines Corp. v. United Mine Workers, 344 F.Supp. 1161 (W.D. Penn., 1972)	15
Boston Mutual Life Ins. Co. v. Insurance Agents' Int'l Union, 171 F.Supp. 125 (D. Mass., 1959), aff'd 268 F.2d 556 (1st Cir., 1959)	21
Bhd. of Railway Trainmen v. Central of Ga. Ry. Co., 415 F.2d 403 (5th Cir., 1969)	20
General Drivers, Local 89 v. Riss & Co., 372 U.S. 517 (1963)	14
Glass Bottle Blowers Assn. v. Arkansas Glass Container Corp., 183 F.Supp. 829 (E.D. Ark., 1960)	22
H.K. Porter Co. v. United Saw, File & Steel Products Workers, 333 F.2d 596 (3d Cir., 1964)	20
Holly Sugar Corp. v. Distillery Rectifying Union, 412 F.2d 899 (9th Cir., 1969)	28
Hydraulic Press Mfg. Co., 39 LA 1135 (Arb. Dworkin, 1962)	21
Intl. Assn. of Machinists v. Hayes Corp., 296 F.2d 238 (5th Cir., 1961)	20, 21, 22
IUOE Local 150 v. Flair Builders, Inc., 406 U.S. 487 (1972)	23, 24, 25, 26
John Wiley & Sons v. Livingston, 376 U.S. 543 (1964)	23, 24, 26
Labor Standards Assn., 48 LA 425 (Arb. Joseph, 1967)	21

Page

Lane, Ltd. v. Larus & Bros. Co., 243 F.2d 364 (2d Cir., 1957) 22

Local 227, International Hod Carriers, etc. v. Sullivan, 221 F.Supp. 696 (E.D. Ill., 1963) 15

Local 342, UAW v. T.R.W., Inc., 402 F.2d 727 (6th Cir., 1968) 19, 20

Magma Copper Co., 40 LA 45 (Arb. Gorsuch, 1962) 21

Riess v. Murchison, 384 F.2d 727 (9th Cir., 1967) 22

San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327 (9th Cir., 1969) 28

Smith v. Union Carbide Corp., 350 F.2d 258 (6th Cir., 1965) 15

Southwestern Electric Power Co. v. Local Union 738, IBEW, 293 F.2d 929 (5th Cir., 1961) 22

Textile Workers v. American Thread Co., 291 F. 2d 894 (4th Cir., 1961) 20

Torrington Co. v. Metal Products Workers Local 1645, 362 F.2d 677 (2nd Cir., 1966) 28

Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir., 1964) 19

United Steelworkers of America v. Amax Aluminum Mill Products, Inc., 451 F.2d 740 (9th Cir., 1971) 28

United Steelworkers of America v. American Intl. Aluminium Corp., 334 F.2d 147 (5th Cir., 1964) 22

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) ..19, 26, 27

Rules — Page

Voluntary Labor Arbitration Rule 8 13

Voluntary Labor Arbitration Rule 12 13

Statutes

Labor Management Relations Act of 1947, Sec. 301(a) 3

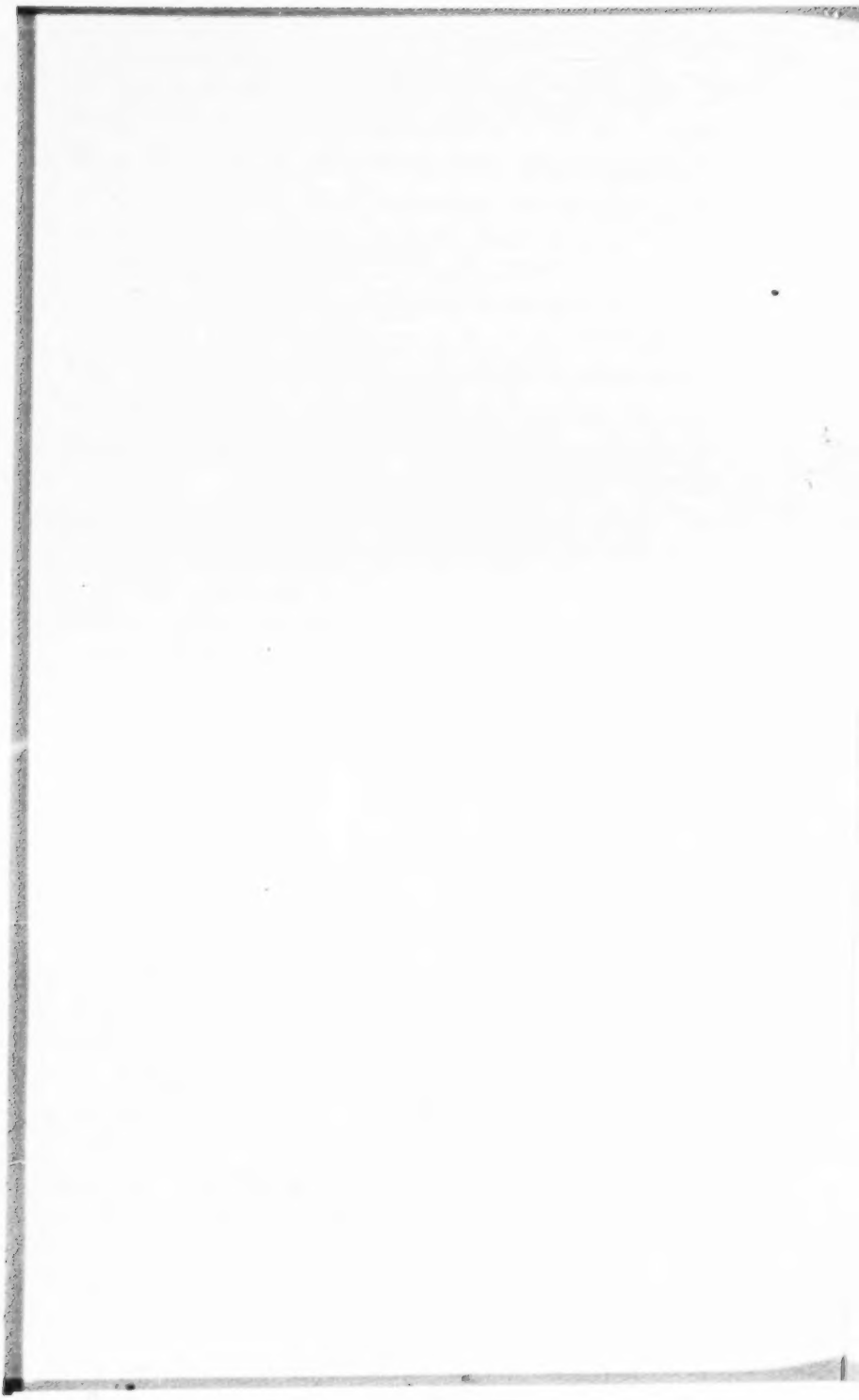
United States Arbitration Act, Sec. 10(d) 14

United States Code, Title 9, Sec. 10(d) 14

United States Code, Title 29, Sec. 185(a) 3

Textbook

5 American Jurisprudence 2d, Sec. 150, p. 631 14



IN THE

Supreme Court of the United States

October Term, 1974
No. 74-982

THE HEARST CORPORATION and its Divisions, LOS ANGELES HERALD-EXAMINER and HILLBRO NEWSPAPER PRINTING COMPANY,

Petitioners,

vs.

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Respondent Los Angeles Newspaper Guild (hereinafter referred to as "the Guild"), hereby opposes the Petition for a Writ of Certiorari filed by Petitioners The Hearst Corporation, etc. (hereinafter referred to as "Hearst"), and respectfully urges that it be denied.

OPINIONS BELOW.

The opinion of the court of appeals, reported at 504 F.2d 636, is set forth in Appendix A to the Petition; the opinion and order of the district court, reported at 352 F.Supp. 1383, is set forth in Appendix B to the Petition.

The opinion of the court of appeals was issued with respect to two companion appeals, No. 73-1742 and No. 73-1838. The two appeals involved the same parties, arose out of the same events, and were argued and considered together. In No. 73-1742, the court ordered the parties to arbitrate the merits of the disputes. The court, in view of its decision in No. 73-1742 holding that the merits of the disputes between the parties should be submitted to arbitration, affirmed the dismissal of the complaint of the Guild and certain members of the Guild (employees of Hearst) for damages and other judicial relief in No. 73-1838.*

Hearst's instant petition seeks a review of the court's decision with respect to No. 73-1742 ordering arbitration of the disputes. Respondent respectfully submits that the petition herein raises no issue warranting review and should be denied.

COUNTERSTATEMENT OF THE CASE.

The decision of the court of appeals in No. 73-1742 arises out of a Petition to Vacate an Arbitration Award which held certain grievances not arbitrable. The underlying dispute, which also forms the basis for the civil complaint in No. 73-1838 for breach of contract, recovery of unpaid wages and certain declara-

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*The Guild and the other plaintiff-appellants in No. 73-1838 have filed a Petition for Writ of Certiorari with respect to the decision of the court in No. 73-1838 affirming the dismissal of plaintiffs' action for judicial relief (Sup.Ct. No. 74-1086). In the petition filed in No. 74-1086, the Guild and its members advised this Court that they sought a writ of certiorari with respect to the court of appeals' decision in No. 73-1838 only if Hearst's instant petition with respect to the court of appeals' decision in No. 73-1742 were to be granted, and that if Hearst's instant petition for writ of certiorari were denied, the Guild and its members would no longer urge the granting of certiorari in No. 74-1086.

tory relief, involves the refusal of Hearst to pay certain vested and earned retirement and severance pay benefits (denominated "alternate benefits" and "dismissal pay") provided for in a series of collective bargaining agreements between the Guild and Hearst. Federal jurisdiction was based on Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a).

There is no substantial dispute as to the material facts, most of which were stipulated by the parties and are set forth in the opinion of the court of appeals.

Under the provisions of a series of collective bargaining agreements between the Guild and Hearst, the first of which was entered into in 1939 and the most recent of which was entered into on January 28, 1966, employees who reached the age of 65 or who completed 25 years of service or who became permanently incapacitated were entitled to receive, upon their resignation, a cash lump sum payment based upon their years of service. Similarly, employees who had completed six months of service were to receive, in the event of dismissal, a cash lump sum payment based upon years of service, and the beneficiaries of deceased employees with six months or more of service were also to receive such a payment upon the death of said employees. The collective bargaining agreements also contained a provision for arbitration of grievances.

In October, 1967 Hearst and the Guild began negotiations for new agreements. These negotiations have continued to date without success. On December 15, 1967, because of the inability of the parties to reach agreement on a new contract, the Guild called a strike against Hearst, which has also continued to date.

After December 15, 1967, Hearst consistently refused to pay all claims for alternate benefits and dismissal pay, consistently denied that the agreements were applicable or of any force or effect or that it had any duties or obligations under the agreements or any duties or obligations to pay any alternate benefits or dismissal pay benefits, consistently maintained that the arbitration provisions of the agreements were not applicable or in effect, and consistently refused to arbitrate the disputes or proceed to the selection of an arbitrator.

From March, 1968 through August, 1968, during meetings between the parties and in frequent correspondence between the parties, the Guild attempted to convince Hearst to pay the claims, filed grievances over Hearst's refusal to do so and, on several occasions, requested arbitration of the disputes and asked Hearst to participate in the selection of an arbitrator. Hearst consistently rejected the claims, maintained that the agreements, and the alternate benefits, dismissal pay and arbitration provisions thereof were no longer applicable or in effect, contended that it had no obligations under the agreements, refused to arbitrate the dispute and refused to participate in the selection of an arbitrator.

In late 1968, a number of members of the Guild attempted to enforce their claims through the office of the Labor Commissioner of the State of California under the provisions of the Labor Code of the State of California. The Labor Commissioner held in favor of the claimants and demanded payment from Hearst, but Hearst failed to comply with the demand. Thereafter, the Labor Commissioner advised the Guild, first, that he would attempt to have a criminal complaint is-

sued against Hearst, and later, that he would attempt to pursue a civil action against Hearst. Finally, the Labor Commissioner declined to take any action against Hearst on the ground that the claimants had an available remedy through arbitration and, on May 12, 1969, reassigned the claims to the claimants.

Thereafter, the Guild wrote to Hearst in another effort to obtain Hearst's agreement either to pay the benefits or proceed to arbitration. Hearst responded by reiterating its position that neither the agreements nor the alternate benefits, dismissal pay or grievance-arbitration provisions thereof were applicable or in effect. Hearst offered to meet concerning the subject matter of the claims, but advised the Guild "we will not meet with you for the purpose of selecting an impartial arbitrator or otherwise proceeding to arbitration." A meeting was held on August 27, 1969, at which time Hearst again repudiated the agreements and the alternate benefits, dismissal pay and arbitration provisions thereof, refused to pay the claims, and refused to select an arbitrator or otherwise proceed to arbitration.

On October 3, 1969, the Guild wrote to the American Arbitration Association ("AAA") and asked it to appoint an arbitrator pursuant to its rules. On October 8, 1969, in disregard of and non-compliance with its own rules, the AAA purported to appoint Thomas T. Roberts to hear the dispute. In purporting to appoint Roberts, the AAA gave no prior notification to the parties, failed to first submit a list of possible arbitrators to either party for selection or rejection of particular arbitrators, and failed to permit Hearst an opportunity to file an answering statement to the Guild

request prior to the appointment of an arbitrator, all as required by the AAA rules.

On November 11, 1969, Roberts wrote each party advising that he had calendared a threshold proceeding for February 3, 1970, to discuss issues relating to the viability of the grievance, the propriety of arbitration, the procedure to be followed and his jurisdiction. Roberts stated further, however, that "any appearance on that date will not constitute a recognition of my jurisdiction nor will it be deemed a waiver of available defenses relating to a lack of arbitrability."

On January 12, 1970, Hearst responded, advising Roberts of its position that the matter was not arbitrable because the collective bargaining agreements had expired prior to accrual of the claims and prior to any demand for payment or arbitration, and because the AAA's rules "are inapposite, and in any event have not been complied with". The letter continued:

> "Since we have been invited, we anticipate being present at the hearings; however, our presence is not a recognition of your jurisdiction nor a general or special appearance. Any participation on our part at those hearings should not be considered as a general appearance, special appearance, nor recognition of your jurisdiction; or is it in any way whatsoever a waiver of our stated position that this matter is not arbitrable. The Herald-Examiner's involvement in this arbitration should not be construed as a relinquishment of its right and intention to proceed before any appropriate tribunal to vindicate its position that this matter is not arbitrable."

At the outset of the meeting on February 3, 1970, Hearst reiterated its position as set forth in its January 12, 1970 letter, again stating that its participation was neither a general nor a special appearance and should not be construed in any way as a waiver of its position that the matter was not arbitrable. Then, for the first time, Hearst contended that the matter was not arbitrable because the Guild allegedly had not made a timely request to the AAA for appointment of an arbitrator. After a short discussion of the proposed agenda for the meeting, the arbitrator interrupted to make clear the basis upon which the proceeding was being conducted:

> "Let's consider another problem now before we go any deeper into this question. It should be clearly stated on the record that the Guild understands that if we go forward this morning regarding anything that the company is not making a special appearance, a general appearance or a half-way between appearance."

When the proceeding continued, the sole matter on which testimony and argument was received was the alleged failure of the Guild timely to request the AAA to appoint an arbitrator under Article VII of the agreements, which provided that if an arbitrator was not selected by mutual agreement of the parties "the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator pursuant to the present rules" of the AAA. Article VII contained specific time limits for each step of the grievance procedure except this final step providing for a unilateral request to the AAA. As to this step, the agreement set forth no time limit.

On August 12, 1970, Arbitrator Roberts rendered his purported Findings and Award. Therein, he specifically limited his inquiry to "the narrow issue of whether or not the Guild sought the appointment of an arbitrator in a timely manner." Rejecting the concept of laches, and instead purporting to insert into the agreement a "statute of limitations", the arbitrator concluded that the Guild had not applied to the AAA for appointment of an arbitrator in a timely manner.

On September 3, 1970, the Guild wrote to Hearst and advised it that the Guild rejected Roberts' purported "Findings and Award" and considered them null and void and not binding on the Guild. The Guild renewed its demand for payment of alternate benefits and dismissal pay.

On September 9, 1970, Hearst replied to the Guild letter of September 3, 1970, and rejected the Guild's demand for payment of alternate benefits and dismissal pay. Hearst further stated that it was its position that Roberts' purported award had settled Hearst's liability.

The Guild thereafter filed a petition to vacate the purported award and a complaint for damages, recovery of unpaid wages, declaratory and other judicial relief.

The district court vacated the purported arbitration award and ordered the parties to submit the dispute to the grievance procedure and, if necessary, to arbitration. The district court also dismissed plaintiffs' com-

plaint on the ground that arbitration was the exclusive remedy.

The court of appeals affirmed the district court's decision, vacating the award on a number of grounds including, *inter alia*, the failure of the AAA to comply with its rules in the purported appointment of the arbitrator (Appendix "A" to Petition, pp. A-7 and A-12), the arbitrator's circumscribing of his role so as to make the hearing a legal nullity by failing to assert jurisdiction over the subject matter of the dispute and by acknowledging that Hearst was making no appearance, either general or special (Appendix "A" to Petition, pp. A-7 and A-8), the arbitrator's insertion of a *quasi* statute of limitations into the agreement, and the absence of any facts in the record upon which the claim of lack of timeliness could be sustained (Appendix "A" to Petition, pp. A-9, A-12, A-14). The court of appeals modified the district court judgment by ordering the parties to proceed directly to arbitration. The court of appeals, in view of its decision ordering arbitration, affirmed the dismissal of the complaint in No. 73-1838.

REASONS FOR DENYING THE WRIT.

1. The Decision of the Court of Appeals Is Based Upon the Complex, Unusual and Unique Facts of the Instant Case and Raises No Substantial Issue of Federal Labor Law.

In its petition for writ of certiorari, Hearst has attempted to read into the decision of the court of appeals broad holdings and far-reaching new principles of law with respect to the scope of review of arbitrator's awards, jurisdiction to decide procedural affirmative defenses, and the necessity of a prior determination of substantive arbitrability. In its attempt to persuade this Court that there are issues warranting its consideration, Hearst has theorized, interpreted, and added conclusions to the decision below which were neither expressed nor intended by the court. As we shall discuss *infra,* the court of appeals made no such broad holdings and established no such far-reaching new principles of law.

On the contrary, as is evident from the decision of the court of appeals, the instant case was decided on the basis of a complex, unusual and unique set of circumstances which is unlikely to reoccur. The court merely held that under the peculiar circumstances of this case, arbitration was the appropriate remedy.

The collective bargaining agreement contained a provision for the appointment of an arbitrator by the AAA upon the unilateral request of the complaining party, such an appointment was made by the AAA, but in disregard of and non-compliance with its rules, and the arbitrator so appointed failed to assert jurisdiction over the subject matter of the dispute and held a so-called hearing at which Hearst was present, but de-

nied that the arbitrator had jurisdiction and objected to the AAA's failure to comply with its rules in the appointment of the arbitrator, and, with the arbitrator's agreement, made no legal appearance—a hearing at which all issues as to arbitrability and as to his jurisdiction were reserved and never decided by the arbitrator.

Moreover, the entire dispute and all proceedings and discussions which occurred were in the context of an ongoing strike and in the face of Hearst's continuing position that the agreements had expired and were of no force or effect, that the matter was not arbitrable and that Hearst was entitled to a judicial determination as to arbitrability, and in the face of Hearst's continuing refusal to arbitrate the dispute, proceed to the selection of an arbitrator or recognize the jurisdiction of an arbitrator.

The court of appeals, recognizing the unique facts herein, stated in its opinion:

> "Both parties have cited hosts of cases dealing with the labor problems of other companies under other circumstances. Most of them stand for the proposition that arbitration is to be favored for a solution of labor disputes as indeed it should be if the subject matter of the disputes is put fairly before the arbitrator.
>
> "However, this court is not called upon to debate the wisdom of other decisions upon other facts. Our task is to decide the relief which should be granted upon the specific facts before us." (Appendix "A" to Petition, p. A-14.)

Clearly, the instant case arises out of a unique set of circumstances. Weighing all of the unusual facts of the

case, the court of appeals concluded that arbitration was the proper forum for resolution of plaintiffs' claims for vested retirement and dismissal benefits and that after seven years of "legal skirmishes" which had failed to reach the merits, it was "time to get on with it". In reaching these conclusions, the court set down no new principles of law, but rather, decided a unique case upon the particular facts before it. Under these circumstances, we respectfully submit that the decision of the court of appeals ordering arbitration raises no substantial issue of federal labor law and does not warrant review by this Court.

2. The Decision of the Court of Appeals Was Based Upon a Number of Independent Grounds, Each of Which Justified the Decision Reached, and None of Which Raises an Issue Warranting Review by This Court.

As will be discussed more fully *infra*, the issues which Hearst attempts to have this Court review are neither raised by nor ruled upon in the decision of the court of appeals herein. Moreover, even if any of such issues were considered by the court below, it is clear that the court made no holding with respect to such issues and, as will be discussed herein, that the decision was based upon a number of independent grounds, each of which justifies the decision reached and none of which warrants review. Under these circumstances, we respectfully submit that the petition for certiorari should be denied.

A. The Conclusion of the Court of Appeals That the AAA Failed to Comply With Its Rules in the Purported Appointment of the Arbitrator Was Correct and Raises No Substantial Issue Warranting Review by This Court.

One of the bases for the court of appeals' decision in the instant case was its conclusion that the AAA purported to appoint Roberts as arbitrator "[i]n disregard of, and in non-compliance with, its own rules."* (Appendix "A" to the Petition, pp. A-7 and A-12.)

As the court of appeals correctly concluded, the purported appointment of the arbitrator in non-compliance with the AAA rules rendered the proceedings and the award invalid.** Section 3B of Article VII of

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*The AAA failed to give Hearst notice of the Guild request and failed to afford Hearst an opportunity to respond to the Guild request, as required by its rules (Voluntary Labor Arbitration Rule 8) and as specifically requested by Hearst in an earlier letter to the AAA. The AAA also failed to send a list of arbitrators to the parties as required by its rules (Voluntary Labor Arbitration Rule 12) prior to making a unilateral appointment, thus depriving at least the Guild (and Hearst if it had chosen to exercise the opportunity) of the right to strike unacceptable arbitrators and list its preference among those who were acceptable.

**Hearst argued below and in a footnote to its petition herein that any defect in the appointment was waived by the Guild when the Guild failed to object in writing to the appointment. This argument is clearly without merit. First, the arbitrator himself reserved to both parties all defenses or arguments as to his jurisdiction in his initial letter to the parties scheduling the preliminary hearing. Second, Hearst, recognizing the invalidity of the appointment, advised Roberts by letter dated January 12, 1970 of Hearst's position that the matter was not arbitrable and that Roberts lacked jurisdiction because *inter alia*, the AAA rules "are inapposite, and in any event have not been complied with". Thus, Hearst reserved its defense based upon the non-compliance with the AAA rules and no binding award could have been issued against Hearst. Accordingly, no *mutually* final and binding award could have been issued and therefore no binding award could have been issued against the Guild. It is, of course, hornbook law that arbitration proceeds as a matter

(This footnote is continued on next page)

the collective bargaining agreements, which gives the complaining party the right unilaterally to request an AAA appointment of an arbitrator provides:

> ". . . the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator *pursuant to the present rules of the voluntary labor arbitration tribunal of the American Arbitration Association,* and the grievance shall be submitted to such arbitrator for final decision." (Emphasis added.)

Thus, the parties agreed to be bound by the decision of an arbitrator only if he was selected pursuant to the rules of the voluntary labor arbitration tribunal. Since an arbitrator serves only by agreement of the parties, he must be selected or designated in accordance with the agreement of the parties. Here the parties had agreed that the AAA could appoint an arbitrator at the request of the complaining party if the parties were unable to agree or if one party refused to participate in the selection, but the AAA was required to make the appointment in accordance with its rules, and this it did not do. Thus, the arbitrator was not selected or designated in accordance with the agreement of the parties, as set forth in the collective bargaining agreement.

Although the issue raised by the selection or designation of an arbitrator in a manner which does not

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of contract between the parties. As a contractual matter, an arbitration award must be final and binding as to both parties, or it cannot be enforced against either. Just as a contract lacking mutuality is invalid, so also is an arbitration award which lacks mutuality. (See 5 Am. Jur. 2d, Arbitration and Award, Section 150, p. 631; Section 10(d), United States Arbitration Act, 9 U.S.C. §10(d); *c.f. General Drivers, Local 89 v. Riss & Co.,* 372 U.S. 517, 520 (1963).)

comply with the agreement of the parties or by the holding of proceedings in a manner which does not comply with such agreement has arisen in the courts infrequently, the courts, when called upon to consider the issue, have concluded that the selection process and method of hearing agreed upon by the parties are integral parts of the agreement to arbitrate and that the contractually agreed upon method for appointment of an arbitrator and method of hearing must, at least in the absence of a waiver by the parties, be followed in order to have a valid appointment, hearing or award. *Smith v. Union Carbide Corp.*, 350 F.2d 258 (6th Cir., 1965); *Local 227, International Hod Carriers, etc. v. Sullivan*, 221 F.Supp. 696 (E.D. Ill., 1963); *c.f. Bethlehem Mines Corp. v. United Mine Workers*, 344 F.Supp. 1161, 1165 (W.D. Penn., 1972).

In the instant case, the court of appeals correctly concluded that the method of appointment of an arbitrator set forth in the collective bargaining agreements, *i.e.*, appointment by the AAA in accordance with its rules, was not followed. Accordingly, the arbitrator was not selected or appointed in accordance with the collective bargaining agreement, the parties did not waive the contractual provisions establishing the method of appointment, the purported appointment was a nullity, and the arbitrator at all times lacked jurisdiction to issue any award. The court of appeals therefore properly vacated the award the arbitrator purported to issue.

In vacating the award on this narrow ground, the court of appeals created no new law and decided no issue of any broad significance in the administration of federal labor laws.

B. The Conclusion of the Court of Appeals That "The Arbitrator so Circumscribed His Role as to Make the Proceedings Before Him a Legal Nullity" Was Correct and Raises No Substantial Issue Warranting Review by This Court.

The court of appeals, in its opinion, correctly concluded that the arbitrator accepted Hearst's refusal to recognize the agreement and to appear and "so circumscribed his role as to make the proceedings before him a legal nullity." (Appendix "A" to Petition, pp. A-7 to A-8 and A-13.) This conclusion is amply supported by the record and forms a separate and independent basis for vacating the award herein.

Having been notified previously that Hearst contended that he lacked jurisdiction of the subject matter, the arbitrator wrote to the parties on November 11, 1969, suggesting that the parties meet to discuss preliminary matters on February 3, 1970, but carefully specifying that any appearance before him on February 3, 1970 would be in the nature of a "special appearance", and would not constitute a recognition of his jurisdiction or a waiver of available defenses relating to a lack of arbitrability. Hearst replied to this letter on January 12, 1970, and, not content with a special appearance, stated:

> "[H]owever, our presence is not a recognition of your jurisdiction nor a general or *special* appearance. Any participation on our part at those hearings should not be considered as a general appearance, *special* appearance nor recognition of your jurisdiction; or is it in any way whatsoever a waiver of our stated position that this matter is not arbitrable." (Emphasis added.)

This insistence by Hearst that it was making no appearance—neither general nor special—by participating in the February 3, 1970 hearing was reiterated by its counsel at the very beginning of that hearing. Hearst clearly was attempting to gain all the benefits of participating in the hearing by way of presenting arguments and objections, while at the same time refusing to submit itself to the jurisdiction of the arbitrator on any issue. But instead of opposing this attempt to have the best of both worlds, the arbitrator specifically concurred in Hearst's efforts, acknowledging that Hearst was "not making a special appearance, a general appearance, or a half-way between appearance."

The arbitrator declined to assert jurisdiction over Hearst or even to attempt to do so; instead, he concurred in Hearst's position that despite its physical presence it was not appearing before the arbitrator and was not bound by anything that might come out of the hearing.

This unique arrangement differs substantially from an *ex parte* arbitration, for in the latter proceeding the party who is not physically present is considered, as a matter of law, to be appearing. The arbitrator, by agreeing that Hearst was not making a legal, as opposed to a physical, appearance, was agreeing that Hearst would not be bound by any decision he might render. As the court of appeals correctly concluded, the arbitrator "so circumscribed his role as to make the proceedings before him a legal nullity."

Under the peculiar procedure adopted by the arbitrator in this case, Hearst could not be bound by any award entered by the arbitrator. Under these circum-

stances, of course, the arbitrator also could not issue any award binding upon the Guild, since an award must be *mutually* final and binding in order to be valid or effective as to either party.*

As the court of appeals correctly concluded, the proceeding was a legal nullity. Under the unique circumstances herein, the purported award was properly vacated on this ground, as well as others. The court's decision vacating the award on this ground raises no issue warranting review by this Court.

C. The Court of Appeals' Conclusion That the Record Contains No Facts Upon Which a Claim of Lack of Timeliness Can Be Sustained Was Correct, Justified Vacating the Award on the Ground That It Was Not Based on the Essence of the Agreement and Raises No Substantial Issue Warranting Review by This Court.

The court of appeals, in its opinion, correctly concluded that the record herein contained no facts upon which a claim of lack of timeliness could be sustained. (Appendix "A" to Petition, pp. A-12 and A-14.) The court, recognizing its limited role in reviewing an arbitrator's award, set down no new broad standards for review. It merely held, in effect, that under the particular circumstances herein the award did not draw its essence from the agreement. Such a holding is consistent with decisions of this Court and decisions in other circuits.

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*As noted *infra* in Section 2A, Hearst's argument below that the Guild waived any arguments by failing to object in writing is without merit since the arbitrator himself expressly reserved such arguments to both parties and since any award which would not have been binding on Hearst would be lacking in mutuality and accordingly could not have been binding on the Guild.

This Court has made it clear that:

> "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960).

And, as the Court of Appeals for the Eighth Circuit held in *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562, 563 (8th Cir., 1964):

> "As arbitration is a matter of contract, the answer to the question [whether the arbitrator exceeded his jurisdiction] must lie within the four corners of the agreement between the parties. *John Wiley & Sons, Inc. v. Livingston*, 84 S.Ct. 909. If the authority to make the . . . award cannot be found or legitimately assumed from the terms of the arbitration agreement, then the arbitrator did exceed his authority. . . ."

It is, of course, well settled that an arbitrator's award will be set aside where he adds terms to an agreement which were not negotiated by the parties or modifies or changes the terms of an agreement, or where his decision is contrary to the language of the agreement or is not based on the essence of the agreement. *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., supra; Local 342, UAW v. T.R.W.,*

Inc., 402 F.2d 727 (6th Cir., 1968); *Textile Workers v. American Thread Co.*, 291 F.2d 894 (4th Cir., 1961); *H.K. Porter Co. v. United Saw, File & Steel Products Workers*, 333 F.2d 596 (3d Cir., 1964); *c.f. Bhd. of Railway Trainmen v. Central of Ga. Ry. Co.*, 415 F.2d 403 (5th Cir., 1969); *Intl. Assn. of Machinists v. Hayes Corp.*, 296 F.2d 238 (5th Cir., 1961).

This rule is no less applicable to an arbitrator's award on procedural arbitrability than to an award on the merits.

In the instant case, the court of appeals concluded that there was no rational or reasonable basis in fact or in law under the peculiar circumstances of this case to sustain a claim of lack of timeliness. The court of appeals created no new rule with respect to the scope of review of procedural arbitrability awards. Rather, under the well-established test for review of arbitration awards, the court's conclusion that the record provided no basis for enforcing the award herein was correct.

Moreover, the arbitrator exceeded his jurisdiction by adding to the grievance-arbitration provisions of the agreement a new time limit, a "statute of limitations," which was not a part of the agreement. The arbitrator's award, which purports to add this so-called "statute of limitations" to the agreement is contrary to the essence of the agreement.

Article VII of the collective bargaining agreement carefully specifies the procedure to be followed by the parties in adjusting disputes. Each of the provisions of that Article sets forth a specific time limit within which each step of the grievance-arbitration process must occur, with the sole exception that no time limit is set forth for requesting the AAA to appoint an arbitrator.

By carefully detailing time limits for each of the other steps of the grievance-arbitration process, the parties clearly indicated that they intended to place no specific time limit or statute of limitations on the request for AAA appointment of an arbitrator.

In cases analogous to the instant case, where express time limits were not set forth, the courts and arbitrators, rather than applying a rigid "statute of limitations", have uniformly applied the doctrine of laches and have considered all of the equitable factors, including the requisite element of prejudice. *Boston Mutual Life Ins. Co. v. Insurance Agents' Int'l Union,* 171 F. Supp. 125 (D. Mass., 1959), aff'd 268 F.2d 556 (1st Cir., 1959); see also *Intl. Assn. of Machinists v. Hayes Corp.,* 296 F.2d 238, 244 (5th Cir., 1961); *Hydraulic Press Mfg. Co.,* 39 LA 1135, 1139 (Arb. Dworkin, 1962); *Magma Copper Co.,* 40 LA 45 (Arb. Gorsuch, 1962); *Labor Standards Assn.,* 48 LA 425, 427 (Arb. Joseph, 1967).

In the instant case, however, the arbitrator did not apply the doctrine of laches. On the contrary, he expressly rejected that doctrine, refused to consider the element of prejudice and concluded that the Guild had to show compliance with the "statute of limitations" which he added to Article VII of the agreement. In failing to apply the doctrine of laches, the arbitrator clearly failed to draw his award from the essence of the agreement. In addition, by adding a "statute of limitations" where the agreement was silent, he added to, changed, amended, and rewrote the provisions of the agreement, all in violation of Article VII, Section 3F, of the agreement, and clearly exceeded his jurisdiction.

It is clear that had the arbitrator applied the doctrine of laches, as he was required to do, he could not pos-

sibly have sustained the company's position. Had equity played any part in the arbitrator's decision, as it should have, none of the claims involved herein could have been barred, since Hearst was not prejudiced by the delay or in any way misled with respect to the Guild's intent to pursue the matter. In addition, if all of the factors of this case had been equitably considered, the delay could not have been deemed unreasonable since the parties were engaged in a labor dispute and this was hardly a "normal" time, most of the delay resulted from the lengthy proceedings before the Labor Commissioner, and the claims were continuously pursued in negotiations during the period in question.

Moreover, as the court of appeals concluded, the claim of lack of timeliness cannot be sustained since it was Hearst and not the Guild which continuously refused to recognize any duty to arbitrate. Under these circumstances, it is clear that Hearst was estopped to claim any lack of timeliness on the part of the Guild.*

The court of appeals herein thus correctly concluded that there was no rational or reasonable basis in the

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*There can be little doubt that Hearst's continuous conduct in this matter as set forth in detail *supra* in the Statement of the Case and in the opinion of the court below, constituted a clear repudiation of the agreement and the arbitration provisions thereof. *Southwestern Electric Power Co. v. Local Union 738, IBEW*, 293 F.2d 929, 932 (5th Cir., 1961); *Lane, Ltd. v. Larus & Bros. Co.*, 243 F.2d 364 (2d Cir., 1957); *Bertero v. Superior Court*, 216 Cal.App.2d 213, 218-220 (2d Dist., 1963); *cf. Riess v. Murchison*, 384 F.2d 727, 732-733 (9th Cir., 1967). It is equally clear that once a party has repudiated arbitration, it cannot insist that the other party comply with the procedural prerequisites to arbitration contained in the agreement. *Southwestern Electric Co. v. Local Union 738, IBEW*, 293 F.2d 929, 932 (5th Cir., 1961); *United Steelworkers of America v. American Intl. Aluminum Corp.*, 334 F.2d 147, 150 (5th Cir., 1964); *Intl. Assn. of Machinists v. Hayes Corp.*, 296 F.2d 238, 243-245 (5th Cir., 1961); *Glass Bottle Blowers Assn. v. Arkansas Glass Container Corp.*, 183 F.Supp. 829 (E.D. Ark., 1960).

agreement, for adding a "statute of limitations" nor any basis upon which to sustain a claim of lack of timeliness. Such a conclusion justifies the vacating of an arbitration award for failure to draw its essence from the agreement.

In vacating the award on this basis, the court of appeals simply applied to the unique facts of this case a well established standard of this Court frequently applied by the circuit courts. The court of appeals in no way established any new standards of review of arbitrator's awards and the decision below does not raise any issue which warrants review by this Court.

3. The Decision Below Does Not Conflict With John Wiley & Sons v. Livingston, 376 U.S. 543.

In its Petition for Writ of Certiorari, Hearst argues that the court of appeals concluded that procedural defenses were not "grievances" under the agreements and therefore were not to be submitted to the arbitrator. Hearst further argues that this conclusion of the court is in conflict with *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) which holds that procedural defenses are for the arbitrator to decide and raises a question left unanswered by this Court in *IUOE Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972).

Hearst's argument, however, misconstrues the decision of the court below. The issue left unanswered by this Court in *Flair, i.e.*, whether an affirmative procedural defense is a "grievance" which is to be submitted to an arbitrator under an arbitration clause covering "grievances" between the parties, was not raised or argued as an issue below and was not ruled upon by

the court below. The instant case, unlike *Wiley* and *Flair,* involves a petition to vacate an existing award rather than a petition to compel arbitration, and the issue of whether an affirmative procedural defense should be submitted to the arbitrator simply was not before the court. Although Hearst attempts to read into the court's opinion some kind of conclusion regarding this issue, the decision sets forth no holding regarding it.

The court of appeals' opinion does contain certain statements by way of dicta with respect to the narrow question whether the timeliness of the arbitrator's own appointment is a matter which should have been submitted to the arbitrator under the peculiar circumstances of this case. Even this narrow question, however, was not raised or argued before the court below and the court rendered no holding thereon.

In the portion of the court's opinion dealing with the instant petition to vacate the award, the court concluded:

> "The record discloses no facts upon which a claim of lack of timeliness can be sustained even if this had been the grievance contemplated by the agreement." (Appendix "A" to Petition, p. A-12.)

This is the only reference to the question of the arbitrator's jurisdiction to consider the timeliness of his own appointment contained in the portion of the court's opinion dealing with the petition to vacate. The Court's holding was that, whether or not the arbitrator had such jurisdiction, the award must be vacated.

It is thus clear that in reaching its decision to vacate the award, the court did not purport to resolve the question of an arbitrator's jurisdiction to decide

an issue of the timeliness of his own appointment—an issue which was neither raised nor argued below.

The only other reference in the court's opinion to the question of whether an issue as to the timeliness of an arbitrator's own appointment may be ruled upon by an arbitrator is in a brief dictum in the portion of the court's opinion (at p. A-14, Appendix "A" to Petition) dealing with the companion lawsuit for damages and other judicial relief. That dictum does not properly raise any issue for consideration in the instant case.

In the companion case, as in the instant case, the court makes no holding with respect to the question of an arbitrator's authority to resolve a question of the timeliness of his own appointment. Rather, the court, in considering its own power to dismiss plaintiff's judicial action and instead order arbitration, cites *Flair* for the proposition that the courts have jurisdiction to determine arbitrability and then to compel arbitration; the court then makes a passing comment, by way of dictum, regarding the propriety of an arbitrator deciding the timeliness of his own appointment. However, the court's holding that, even if Hearst's repudiation gave the Guild the right to obtain a judicial determination of its rights, arbitration was the proper road to follow, is in no way dependent on or indeed even related to its comment regarding an arbitrator's ruling on the timeliness of his own appointment.

It is thus apparent that even in the companion case involving the complaint for damages and other judicial relief, the court did not render any holding with respect to the issue left unanswered by this court in *Flair*. In any event, it is clear that in the instant case,

involving the petition to vacate the award, the issue left unanswered in *Flair* was not before the court, was not ruled upon, and was not the subject of any holding of the court.

The decision of the court of appeals thus does not conflict with *Wiley*, does not purport to determine any issue left undecided by this Court in *Flair* and does not present any substantial question warranting review by this Court.

4. The Decision Below Does Not Conflict With United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, or With the Decisions of Other Circuits Holding That an Arbitration Award Is to Be Vacated When It Fails to Draw Its Essence From the Agreement and Does Not Raise Any Substantial Issue Warranting Review by This Court.

In its Petition for Writ of Certiorari, Hearst argues that the decision below conflicts with the principle set forth in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and cited and relied upon by the circuit courts in a number of decisions that the role of the courts in reviewing arbitrators' awards is limited, but that awards are to be vacated when they fail to draw their essence from the agreements. In particular, Hearst argues that (1) the court below failed to apply the proper standard of review and engaged in plenary judicial review of the award; (2) the decision must be read as holding that the *Enterprise* standard does not apply to procedural awards; and (3) that the decision amounts to a ruling that an award cannot draw its essence from the agreement where the arbitrator implies a term into the agreement.

Hearst's arguments attempt to read into the decision of the court of appeals holdings neither made nor suggested by the court itself nor, indeed, even argued for by the Guild.

In Section 2C *supra,* we have discussed at length the basis of the court's conclusion that there were no facts upon which a claim of lack of timeliness could be sustained. Although the court did not specifically state that the award failed to draw its essence from the agreement, there can be no doubt that the court so concluded. The court was obviously of the opinion, and correctly so, that there was no reasonable or rational basis for the award and therefore that the arbitrator had failed to draw his award from the essence of the agreement.

Hearst argues that the court engaged in a plenary review of the award and failed to apply the *Enterprise* standard of review to the procedural award herein. Nowhere in its opinion does the court hold or even suggest, however, that the *Enterprise* standard of review is inapplicable to a procedural award or that the courts are to engage in *de novo* review of the merits. Nor did the Guild so contend in briefs or argument to the court below.

Finally, Hearst argues that the decision below amounts to a ruling that an award cannot draw its essence from the collective bargaining agreement where the arbitrator implies a term into the agreement. Again, Hearst reads into the decision a holding not made by the court itself. The court in no way holds or suggests that an arbitrator is powerless to supply missing terms which give effect to the intent of the parties, and the court's decision in no way conflicts with the decisions of other circuits enforcing awards which have done so.

The court, in the instant case, has set down no rule that an arbitrator cannot imply a term into the agreement. Rather, the court has held that under the particular circumstances herein, the so-called "statute of limitations" added to the agreement by the arbitrator was unsupportable as a matter of fact and law. Accordingly, the award did not draw its essence from the agreement.

In arguing that the court herein has adopted a rule that an arbitrator cannot imply a term into the agreement, Hearst suggests that the court below may have followed or been influenced by the decision of the Court of Appeals for the Second Circuit in *Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677 (2nd Cir., 1966). Once again, in an attempt to raise an issue in this Court, Hearst attempts to read into the opinion something which simply is not there. The court of appeals does not even cite *Torrington* in the decision herein. Moreover, the Second Circuit's view in *Torrington* has previously been expressly rejected by the Ninth Circuit. *Holly Sugar Corp. v. Distillery Rectifying Union*, 412 F.2d 899, 905 (9th Cir., 1969).

Although Hearst has attempted in its petition herein to create the appearance of a conflict between the Ninth Circuit and other circuits with respect to the scope of review of arbitrator's awards, it is clear that no such conflict exists. The Ninth Circuit, like the other circuits, has consistently applied a narrow, limited scope of review in arbitration cases.*

**United Steelworkers of America v. Amax Aluminum Mill Products, Inc.*, 451 F.2d 740 (9th Cir., 1971); *Holly Sugar Corp. v. Distillery Rectifying Union*, 412 F.2d 899 (9th Cir., 1969); *San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co.*, 407 F.2d 1327 (9th Cir., 1969); *Anaconda Co. v. Smeltermen's Union No. 16*, 402 F.2d 749 (9th Cir., 1968).

Nothing contained in the decision in the instant case evidences a departure by the Ninth Circuit from its well-established policy of affording limited review of arbitrator's awards. In the instant case, the Ninth Circuit set down no new rules broadening the scope of review of arbitration awards; it simply concluded that under the peculiar, unique facts of this case, and for a number of separate and independent reasons, the award should be vacated.

5. The Decision Below Does Not Nullify Ex Parte Arbitration and Does Not Frustrate the National Labor Policy of Favoring Arbitration as the Method for Settling Disputes.

Hearst argues in its Petition for Writ of Certiorari that the court of appeals expressly affirmed the holding of the district court that substantive arbitrability must be decided by a court before an *ex parte* arbitration may be held whenever one of the parties raises the issue of substantive arbitrability.

It is clear, however, that the court of appeals did not affirm or adopt such a holding; although the court of appeals recited the district court's conclusion of law on this issue along with the other conclusions of law of the district court, the court of appeals neither relied upon nor adopted nor even discussed this conclusion of law and certainly made no holding to the effect suggested by Hearst.

Thus, the court of appeals, immediately after reciting the district court's conclusions of law, goes on to say:

> "Of particular importance are the conclusions that the agreements are in full force and effect; that the grievance and arbitration provisions cover

> the alternate benefits and dismissal pay disputes and that Hearst is bound to resolve the grievances in the manner provided by the agreements; and that the parties must proceed to adjust their dispute as provided in Article VII." (Appendix "A" to Petition, p. A-11.)

The court of appeals in its discussion following its recital of the findings and conclusions below did not refer to the district court's conclusion regarding the necessity of a prior determination of substantive arbitrability. In its opinion, following the above quoted remarks, the court of appeals sets forth its own holdings. These holdings were based upon the appointment of the arbitrator in non-compliance with the AAA rules, the arbitrator's failure to assert jurisdiction over the subject matter and acquiescence in Hearst's non-appearance, and the absence of any facts to support the claim of lack of timeliness.

Clearly, the court of appeals in no way relied upon or adopted the district court's conclusion that a prior determination of substantive arbitrability was a prerequisite to proceeding to arbitration. The decision of the court of appeals thus does not in any way nullify or even affect *ex parte* arbitration, since it in no way holds that substantive arbitrability must be decided prior to proceeding to *ex parte* arbitration.* The deci-

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*Although we believe it clear that the court did not hold that a prior determination of substantive arbitrability is a prerequisite to *ex parte* arbitration and that we therefore need not consider the effect such a holding might have, we also believe that Hearst grossly overstates the likely result of any such holding. First, al-

sion simply holds that under the particular circumstances of this case, and for a number of independent reasons, as discussed above, the award should be vacated.

CONCLUSION.

The decision of the court of appeals herein is based upon the peculiar, unique circumstances of the instant case. The court recognized that arbitration is the preferred remedy in labor relations. It set forth no new principles of law and the decision herein contains no broad holdings or legal conclusions which will be generally applicable to other cases. The court did not in any way undermine the arbitral process or arbitration; indeed it ordered the dispute arbitrated. It is highly unlikely that the particular facts in the instant case will ever reoccur, and the court of appeals' decision is carefully limited to those particular facts and raises no issues of any general significance in the administration of the federal labor laws. Because of the uniqueness

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though many collective bargaining agreements incorporate AAA or Federal Mediation and Conciliation Service rules with respect to the conduct of the hearing, very few provide for *ex parte* appointment of an arbitrator. Thus, in most cases where one party denies arbitrability, the other party is required to go to court first to obtain an arbitral hearing. Second, if the parties choose to submit substantive arbitrability to the arbitrator, nothing prevents them from doing so. Finally, if substantive arbitrability is an issue, it may well have to be decided by the court, and it may therefore serve the interests of both parties and facilitate amicable settlements if the substantive arbitrability issue is decided in that forum at the outset. In any event, we believe it clear that the court of appeals in no way adopted the view that a decision as to substantive arbitrability is a prerequisite to a hearing or in any way based its decision herein on such a conclusion. Under these circumstances, of course, this issue is simply not raised by the decision below.

of the instant case and the court's express recognition of that uniqueness, the decision herein will have no impact on existing, established principles.

For all of these reasons, as well as the reasons set forth above, we respectfully submit that the instant case raises no issues warranting the granting of certiorari and urge that the Petition for Writ of Certiorari be denied.

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March 7, 1975.

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SUPREME COURT, U. S.

No. 74-982

FILED
MAR 28 1975

IN THE

Supreme Court of the United States

October Term, 1974

THE HEARST CORPORATION and its Divisions, LOS ANGELES HERALD-EXAMINER and HILLBRO NEWSPAPER PRINTING COMPANY,

Petitioners,

vs.

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

Page

Supplemental Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 1

The Decision Below Is in Direct Conflict With a Recent Decision of the Eighth Circuit Which Holds an Award Draws Its Essence From the Collective Bargaining Agreement Even Though the Arbitrator Implies a Term Into the Agreement When Interpreting It 2

Conclusion 4

Appendix Supp. A. Opinion of the United States Court of Appeals, Eighth Circuit .....App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
I.U.E. v. Peerless Pressed Metals Corp., 489 F.2d 768 (1st Cir.), cert. den., 414 U.S. 1022 (1973)	4
United Automobile Workers v. White Motor Corp., 505 F.2d 1193 (8th Cir. 1974), pet. for cert. filed, Sup. Ct. No. 74-1040, 43 U.S.L.W. 3505 (Feb. 20, 1975)	2, 3, 4
United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)	3

Rule	
United States Supreme Court Rules, Rule 24	1

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Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 24, Petitioners file this Supplemental Brief in support of their Petition to call attention to a recent decision of the United States Court of Appeals for the Eighth Circuit and to other intervening matter not available to Petitioners at February 7, 1975, the date of their last filing.

The Decision Below Is in Direct Conflict With a Recent Decision of the Eighth Circuit Which Holds an Award Draws Its Essence From the Collective Bargaining Agreement Even Though the Arbitrator Implies a Term Into the Agreement When Interpreting It.

Petitioners have argued that the Ninth Circuit's decision below herein (reported at 504 F.2d 636 and set forth in Appendix A to the Petition) is in direct conflict with decisions of the First, Third, Seventh and Tenth Circuits which hold that a labor arbitration award draws its essence from the collective bargaining agreement even though the arbitrator implies a term into the agreement when interpreting it. (See Petition pp. 18-22.) The decision below also directly conflicts with the recent decision of the Eighth Circuit in *United Automobile Workers v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974), *petition for cert. filed*, Sup. Ct. No. 74-1040, 43 U.S.L.W. 3505 (filed Feb. 20, 1975). A copy of the Eighth Circuit's opinion is set forth in "Appendix Supp. A" hereto.

In *White Motor Corp., supra*, the parties collective bargaining agreement adopted and incorporated by reference a "Pension Agreement and Plan" which contained clear and unambiguous language giving the employer the sole right to terminate the plan "at any time." (App. Supp. A at 2.) The employer selected a date to terminate the plan which resulted in an arbitration over the employer's right to do so. The arbitrator ruled that, despite the clear language of the plan and despite the fact that no termination date was provided in the plan, the pension plan could not be terminated by the employer until the expiration date of the collective

bargaining agreement incorporating the plan. Thus, the arbitrator implied a termination date for the plan where none was expressly provided, and the termination date implied was clearly contrary to the employer's express right to terminate the plan at any time. In arriving at his award, the arbitrator looked to the history of collective bargaining between the parties and resorted to the arbitrator's own experience outside of the agreement he was then interpreting in order to ascertain the parties' intent.

Upon the union's petition for enforcement, the district court enforced the award and on appeal the Eighth Circuit affirmed, holding, consistent with *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), that the arbitrator's award did draw its essence from the collective bargaining agreement even though the arbitrator implied a term. The court of appeals recognized that "[i]n interpreting a collective bargaining agreement it is often necessary to go outside the four corners of the contract itself and examine the agreement history to ascertain the intent of the agreement and determine the rights and duties of the parties." (App. Supp. A at 8-9.) This is what both arbitrators did in the instant case and in *White Motor Corp.*: however, in the instant case the award was vacated on this ground and on other grounds; in *White Motor Corp.* the award was enforced.

The considerable confusion among the circuits in interpreting and applying the *Enterprise* standard of judicial review of arbitration awards, and more particularly, whether an arbitration award which implies a term into a collective bargaining agreement can nevertheless draw its essence from the collective bargaining

agreement, is an important and recurring question* which warrants review by this Court. Presently the Court has before it petitions for certiorari in two cases, the instant case and No. 74-1040, raising the same issue after the Eighth and Ninth Circuits decided the issue differently.

CONCLUSION.

For the foregoing reasons and for the reasons set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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GORDON E. KRISCHER

March 21, 1975

*The question has been presented to the Court at least three times in the last two terms, including the instant case, No. 74-1040, and in I.U.E. v. Peerless Pressed Metals Corp., 489 F.2d 768 (1st Cir.) *cert. denied*, 414 U.S. 1022 (1973) (cited in the Petition herein at pp. 20, 23-24).

APPENDIX SUPP. A.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), et al., Plaintiffs-Appellees,

v.

WHITE MOTOR CORPORATION, et al.,

Defendants-Appellants.

No. 74-1379.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 11, 1974.

Decided Nov. 11, 1974.

Before GIBSON, Chief Judge; BRIGHT and STEPHENSON, Circuit Judges.

BRIGHT, Circuit Judge.

White Motor Corporation (Company) appeals from the judgment of the district court enforcing an arbitration award in favor of appellee-United Auto Workers Union (Union). We affirm.

In January 1972, the Company notified the Union that it planned to close two factories manufacturing farm machinery located at Hopkins and Minneapolis, Minnesota. The Company also informed the Union that the Pension Plan for the employees at these two plants would be terminated as of June 30, 1972. The Union, claiming that the Pension Plan could not be terminated until May 1, 1974, the expiration date of the Collective Bargaining Agreement, sought arbitration of the dispute. The Company refused, and on motion of the Union, the federal district court issued an order compelling arbitration. The arbitration sustained the

Union's position and his award prohibited the Company from terminating the Pension Plan for Union-represented employees before the expiration date of the Collective Bargaining Agreement. White Motor Corp. & UAW, 61 Lab.Arb. 320 (1973) (Seitz, Arbitrator). After the Company announced that it would not comply with the arbitration award, the Union sought enforcement of the award in a suit filed in federal district court pursuant to Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185. On cross motions for summary judgment, the district court (Judge Larson) ruled in favor of the Union and ordered enforcement of the award. The Company appeals from that decision.

The Company contends that specific and unequivocal language in an agreement between the parties authorized it to terminate the then existing Pension Plan at any time. The phrase relied on by the Company, as found in the Pension Plan, reads: "The Company shall have the sole right at any time to terminate the entire Plan." The Company maintains that since the foregoing provision is "clear and unambiguous," the arbitrator exceeded his authority in extending the Pension Plan beyond June 30, 1972, the termination date selected by the Company.

In ruling for the Union, the arbitrator did not limit his analysis to the explicit terms of the Collective Bargaining Agreement and the Pension Plan but also examined the history of the pension arrangements commencing with the agreements executed in 1950 between the Company and the Union[1] consisting of three

[1]The United Auto Workers became the bargaining representative for the employees on July 6, 1955. Prior to that date, the employees were represented by Local 1146 of the United Electrical, Radio and Machine Workers of America.

separate documents—a Collective Bargaining Agreement, a Pension Agreement, and a Pension Plan. The Pension Agreement recited that the Company would adopt and establish a Pension Plan in the form attached for the benefit of all employees, including both union and nonunion workers. Section 10.02 of that attached Pension Plan recited the crucial language, to which we have referred, ostensibly granting the Company the right to terminate the Pension Plan at will. This right of termination, however, did not become binding on Union employees since the Pension Agreement embodied this stipulation:

> The Company waives its right to amend the [Pension] Plan or terminate it as to employees represented by the Union while this [Pension] Agreement is in full force and effect.

The 1950 Collective Bargaining Agreement listed a termination date of September 1, 1952,[2] while the Pension Agreement recited a later expiration date of January 1, 1956.[3] Prior to 1968, the Union and the Company made periodic changes in the pension arrangements by formally amending the Pension Agreements through written documents, each entitled "Amendment of Pension Agreement." These amendments were dated respectively November 16, 1954, February 8, 1957, October 22, 1959, October 1, 1962, and May 10, 1965. Except for the May 10, 1965, amendment, each amendment provided a termination date for the Pension Agreement extending beyond the expiration date of the

---

[2]The Collective Bargaining Agreement was to continue thereafter for yearly periods unless the parties gave a notice of termination at least 60 days prior to the end of the contract period.

[3]The Pension Agreement was to continue on a yearly basis thereafter unless terminated by one of the parties on six months notice.

then existing Collective Bargaining Agreement. For example, the Amendment of Pension Agreement dated October 1, 1962, extended the 1950 Pension Agreement to January 1, 1966, although the terms of the then existing Collective Bargaining Agreement contained a termination date of May 1, 1965. In 1965, however, the Amendment of Pension Agreement and the Collective Bargaining Agreement provided for essentially the same termination date.[4] Each Amendment of the Pension Agreement included a separate paragraph with essentially the following language:[5]

> In all other respects [except as amended] the Pension Agreement entered into between the parties hereto under date of September 7, 1950, and the Pension Plan therein referred to are hereby ratified and confirmed. [Amendment of Pension Agreement dated November 16, 1954.]

Thus, until 1968, the respective rights of the parties regarding termination of the Pension Plan were clear. The Company reserved the right to unilaterally terminate the Pension Plan for nonunion employees at any time. As to Union employees, however, the Company's right to terminate the Pension Plan was limited to the expiration date specified in the Pension Agreements and its subsequent amendments.

---

[4]The Collective Bargaining Agreement terminated at 12:01 A.M. May 1, 1968, while the Amendment of Pension Agreement terminated April 30, 1968.

[5]This paragraph was slightly altered in the 1965 Amendment of Pension Agreement:

> In all other respects said Pension Agreement, as amended, and the Pension Plan referred to therein, as amended, are hereby ratified and confirmed.

Additionally, the 1962-1965 and the 1965-1968 Collective Bargaining Agreements contained general information concerning benefits available under the Pension Plan.

In the Collective Bargaining Agreements for 1968-1971 and 1971-1974, the format for the pension arrangements was altered. These bargaining agreements each contained this paragraph:

> The parties hereto have agreed to a *Pension Agreement and Plan,* printed under separate cover, which is made a part of this Agreement the same as if set forth at length herein. (Emphasis added).

A signed document entitled "Minneapolis-Moline Pension Plan" was attached to these Bargaining Agreements. This attachment included similar terms and was essentially the same in format as the original 1950 Pension Plan, with, of course, changes in benefits derived from the various amendments made over the intervening years.

The parties in 1968 and 1971, however, did not execute any document similar to the Pension Agreement of 1950, nor any agreement similar to the later documents entitled Amendment to Pension Agreement, in which the Company had expressly agreed to waive its right to unilaterally terminate the Pension Plan at any time as to Union employees. Because of the absence of a waiver provision in the 1968 and 1971 documents, the Company argues that the clause in the Pension Plan providing for termination "at any time" becomes the controlling provision of the agreement regulating termination of the Pension Plan as to all employees. In rejecting this argument, the arbitrator stated:

> The record made satisfies me that in the negotiations leading to the 1968 collective agreement and the 1968 Pension Agreement and Plan, nei-

ther side made a demand or proposal related to the abandonment of the waiver provisions; and, apparently, it had not been the subject of bargaining or even discussion. The Union brief argues that the absence of the waiver provision was not even noticed.

* * *

A long-standing and repeatedly expressed waiver of a right to terminate a Pension Plan as to union-represented employees disappeared from the 1968 and 1971 Pension Agreements under circumstances that nobody can account for or explain. The absence of the provision affects very substantial rights under the Plan.

The arbitrator concluded:

Thus, the 1971 Pension Agreement and Plan which was merged into and absorbed by and is a component of the collective bargaining agreement lives to the end of the term of the collective bargaining agreement. The Plan has no independent termination date nor is there a Pension Agreement with a different termination date. The Pension Agreement and Plan of 1971 draw their termination date from the collective bargaining agreement of which they are parts.

These circumstances leave the Company free to invoke Section 10.02 of the Plan to terminate the Plan at will insofar as members of non-bargaining unions are concerned. The fact that the Plan has been absorbed into the collective bargaining agreement, however, reinforces the point that, insofar as union-represented employees are concerned, the Company's right to terminate, ex-

> pressed in Section 10.02 of the Plan, is affected by and is subordinated to the provisions of the collective agreement.
>
> Accordingly, on this question, I conclude that the Company had no power or right unilaterally to terminate the Plan as to union-represented employees on June 30, 1972. (Footnote omitted).

The district court ruled that the arbitrator had not exceeded his authority and ordered the arbitrator's award enforced. The Company asserts that the arbitrator exceeded his authority in not enforcing the clear terms of a written agreement binding the parties on the issue presented to the arbitrator and that, therefore, the district court committed error in not setting the arbitrator's award aside.

In resolving this case, we note initially that judicial review of an arbitrator's decision is limited. The scope of that review is discussed by the Supreme Court in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960):

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. * * *
>
> [T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. * * * He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [*Id.* at 596-597, 80 S.Ct. at 1360-1361 (footnote omitted).][6]

Thus, our function is limited solely to determining whether the arbitration decision, in the language of the Supreme Court, "draws its essence from the collective bargaining agreement." 363 U.S. at 597, 80 S.Ct. at 1361.

In interpreting a collective bargaining agreement it is often necessary to go outside the four corners of the contract itself and examine the agreement history to ascertain the intent of the agreement and determine the rights and duties of the parties. The touchstone for the construction and interpretation of labor agreements subject to arbitration is found in the *Steelworkers*

---

[6]*See* United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 567-569, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-583, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) (these two cases and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 563, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) comprise the *Steelworkers Trilogy*); Western Iowa Pork Co. v. National Bro. Pack & Dairy Wkrs, 366 F.2d 275 (8th Cir. 1966). In *Western Iowa Pork*, this court stated that "* * * in making the determination of whether an arbitrator has exceeded his authority the agreement must be broadly construed with all doubts being resolved in favor of his authority." 366 F.2d at 277.

Trilogy, supra. In the second case of the *Trilogy,* United Steelworkers of America v. Warrior & Gulf Nav. Co., *supra,* the Supreme Court specifically examined the unique characteristics of the labor contract with which the arbitrator deals:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. * * * The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.
>
> "* * * There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties.
>
> One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages * * *."
>
> Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. [363 U.S. at 578-580, 80 S.Ct. at 1351-1352.]

In discussing the labor arbitrator's source of law, the Court added that he

> is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. [363 U.S. at 581-582. 80 S.Ct. at 1352.]

In Humble Oil & Refining Co. v. Teamsters Local 866, 447 F.2d 229 (2d Cir. 1971), the Second Circuit, in discussing the authority of the arbitrator to resolve a labor-management issue by relying on agreement history, stated:

> To determine whether the Company had violated rights intended by the parties to be preserved by the language of that provision, the [arbitration] Board was required to discover the intent of the parties, and to do this it looked to evidence and not merely the cold and cryptic words on the face of the agreement which shed little light on the issue. We see nothing in the arbitration clause which forbids resort to such rudimentary tools of construction. If the Board were barred from resorting to bargaining history and rights established under similar language in past contracts, the parties to the contract would be remitted to securing arbitration only when there was a violation of a provision so plain and unambiguous as to require no collateral evidence of intent—and we might add hardly requiring arbitration itself. * * * The arbitrators here, * * * confronted with an opaque but "express provision" of the contract governing the rights at issue, sensibly sought clarification in totally relevant evidence beyond the language of the contract. [*Id.* at 232-233.]

Other cases support the view that an arbitrator may examine agreement history in order to resolve a question not expressly covered by a collective bargaining agreement. *See* Baldwin-Montrose Chem. Co. v. International Rubber & Plastic Wkrs. 383 F.2d 796 (6th Cir. 1967); H. K. Porter v. United Saw. File & Steel

Products Wkrs, 333 F.2d 596 (3d Cir. 1964); Independent Petroleum Wkrs. v. American Oil Co., 324 F.2d 903 (7th Cir. 1963), aff'd by an equally divided court, 379 U.S. 130, 85 S.Ct. 271, 13 L.Ed.2d 333 (1964); *cf.* Teamsters Local 688 v. Crown Cork & Seal Co., 488 F.2d 738 (8th Cir. 1973).

We believe the record demonstrates that the Collective Bargaining Agreement executed in 1971 (as well as 1968), discloses an ambiguity in two respects relating to the Company's right of termination. First, the Bargaining Agreement specifically refers to an attached "Pension Agreement and Plan." This phrase could refer to a single document consisting of both a Pension Agreement and a Pension Plan or, as had been the case in prior years, to two documents, a separate Pension Plan and a separate Pension Agreement. As we have already noted, the attached Pension Agreement and Plan was entitled "Minneapolis-Moline Pension Plan" and referred to a document essentially the same in form as the 1950 Pension Plan but with modifications wrought by amendments made over the past two decades. The phrase "Pension Agreement," as previously used by the parties, designated a document separate from the Pension Plan and contained a termination date and a specific waiver of the Company's right to terminate the Pension Plan at will as to Union employees. Since neither the contract documents nor contemporaneous history of the 1968 and 1971 Bargaining Agreements offers any explanation for the absence of an attachment to the Bargaining Agreement entitled "Pension Agreement," an arbitrator could conclude that his omission was inadvertent, permitting him to resort to evidence extrinsic to the written contract documents

to determine the full agreement intended by the parties. When an agreement may be expected to speak on a subject but does not, its silence imports ambiguity on that subject. *See* Humble Oil & Refining Co. v. Teamsters Local 866, 447 F.2d 229 (2d Cir. 1971); Baldwin-Montrose Chem. Co. v. International Rubber & Plastic Wkrs, 383 F.2d 796 (6th Cir. 1967); H. K. Porter v. United Saw, File & Steel Products Wkrs, 333 F.2d 596 (3d Cir. 1964).

In commenting on this omission, the arbitrator observed:

> [T]he writer's experience informs him that it is most difficult to conceive that a Union would knowingly, lightly, or casually acquiesce in the elimination of a Company waiver of a right to terminate a pension plan in which the employees it represents participate without a vigorous struggle or, at least, the attempt to obtain some satisfactory quid pro quo. To accept the Company's thesis would mean that one week after the signing of the 1971 (or 1968) pension agreement and plan, the Company, at will, could have terminated the Plan, despite the fact that it had agreed in writing to waive the exercise of that right for eighteen years in a series of five documents. The Company's thesis is incompatible with the institutional behavior of labor organizations in our society and does not take account of the reasonable expectations that the usages of the past have engendered.

The arbitrator properly noted a second aspect of the ambiguity relating to the termination date for the Pension Plan. The bargaining history disclosed that prior

to 1968 the parties had always specified a definite termination date of the Pension Plan extending to or beyond the date established for the expiration of the Collective Bargaining Agreement. But in 1968 and 1971, the "Minneapolis-Moline Pension Plan" did not contain any specific termination date. Given this omission, the arbitrator did not exceed his authority in concluding that the May 1, 1974, date for termination of the Collective Bargaining Agreement as the only relevant date specified in the documents executed by the parties served also as the termination date of the Pension Plan as to Union members.

Our review of the record satisfies us that the arbitrator arrived at a decision drawn from the contract documents and from the history of the agreements leading up to the 1971 Collective Bargaining Agreement. We conclude, contrary to the Company's contentions, that the arbitrator did not exceed his arbitral authority and that his award is valid since it "draws its essence from the collective bargaining agreement." United Steelworkers of America v. Enterprise Wheel & Car Corp., *supra*, 363 U.S. at 597, 80 S.Ct. at 1361.

Accordingly, the district court properly enforced the arbitrator's award.

Affirmed.

[illegible]

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, *et al.*,

Petitioners,

vs.

THE HEARST CORPORATION and Its Division, LOS ANGELES HERALD-EXAMINER and HILLSBORO NEWSPAPER PRINTING COMPANY,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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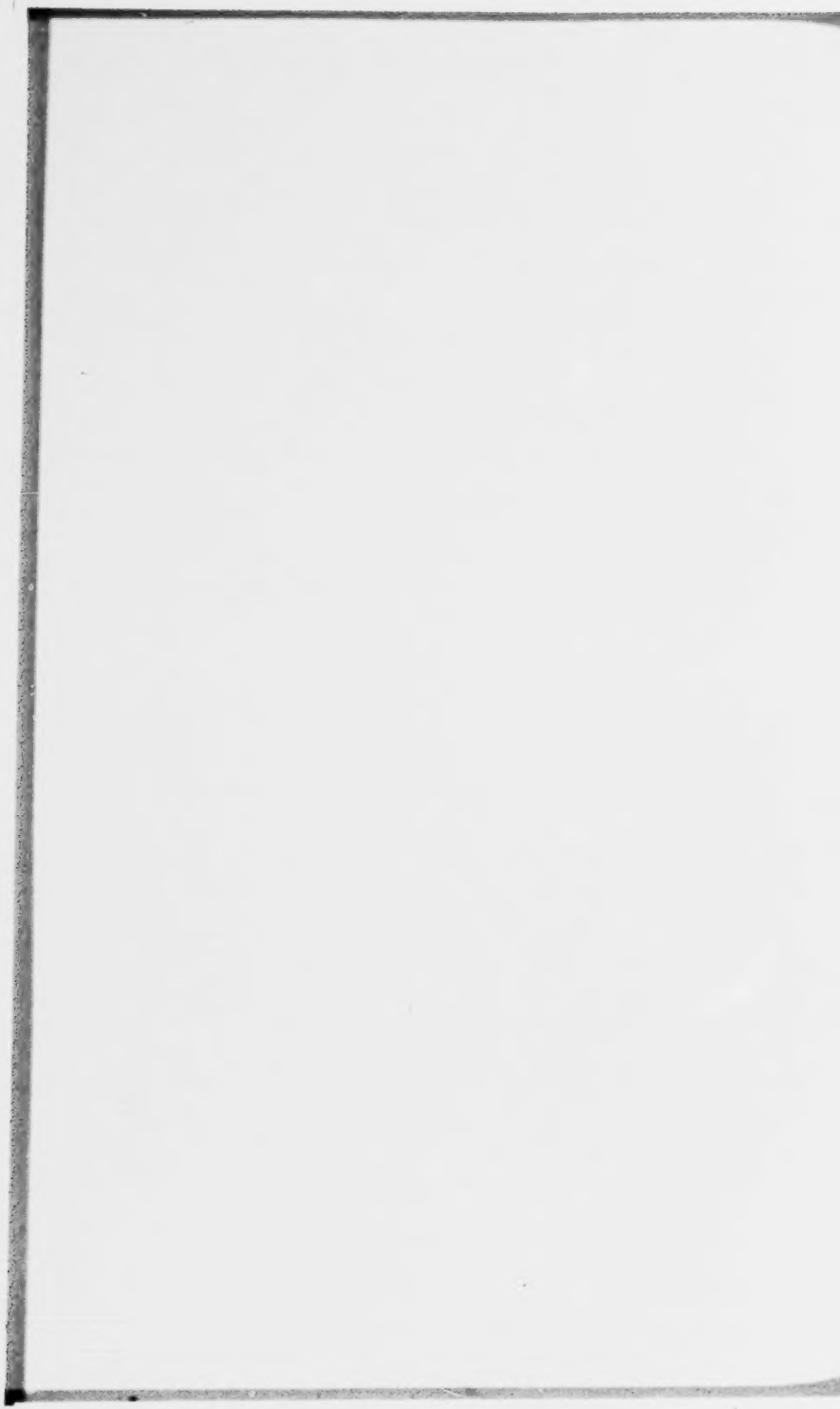

SUBJECT INDEX

	Page
Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit	1
Opinions Below	1
Questions Presented	2
Counterstatement of the Case	2
Introduction	4
The Ex Parte Arbitration Provided for in the Collective Bargaining Agreement Is and Was the Exclusive Remedy for Guild	6
There Is No Public Policy Which Requires That the Ex Parte Provision in the Agreement Be Declared Invalid	18
Conclusion	19

TABLE OF AUTHORITIES CITED

Cases	Page
A/S Ganger Rolf v. Zeeland Transportation Co., 191 F.Supp. 359 (S.D.N.Y. 1961)	12
Brink v. Allegro Builders, Inc., 58 Cal.2d 577 (1962)	13
Eckert v. Davis, 161 Cal.App.2d 638 (1958)	13
Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974)	8
International Association of Machinists v. Hayes Corp., 296 F.2d 238 (5th Cir. 1961)	10
Iowa Beef Packers, Inc. v. Thompson, 185 N.W.2d 738 (Iowa 1971) cert. grtd. 404 U.S. 820, 92 S.Ct. 79, 30 L.Ed.2d 48 (1971), dism. as improvidently grtd. 405 U.S. 228, 92 S.Ct. 859, 31 L.Ed.2d 165 (1972)	16
Kentucky River Mills v. Jackson, 206 F.2d 111 (Sixth Cir. 1953), cert. den. 346 U.S. 887, 74 S.Ct. 144, 98 L.Ed. 392	11
Lane, Ltd. v. Larus & Brother Company, 243 F.2d 364 (2d Cir. 1957)	10
Reiss v. Murchison, 384 F.2d 727 (9th Cir. 1967)	10
Smith v. Campbell & Facciolla, Inc., 202 Cal.App. 2d 134 (1962)	13
Southwestern Electric Power Company v. Local Union 738, IBEW, 293 F.2d 929 (5th Cir. 1961)	10
Standard Magnesium Corporation v. Fuchs, 251 F.2d 455 (Tenth Cir. 1957)	12
Teamsters Local Union v. Braswell, 392 F.2d 1, mod. 395 F.2d 655 (5th Cir. 1968)	10

Page

United States Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971) 14

United Steelworkers of America AFL-CIO v. American Intl. Aluminum Co., 334 F.2d 147 (5th Cir. 1964) 10

United Steelworkers of America v. American Manufg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed. 1403 (1960) 5, 8, 14, 18

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960) 5, 8, 14, 18

United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1358, 4 L.Ed.2d 1409 (1960) 5, 8, 14, 18

Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L. Ed.2d 842 (1967) 6, 9, 18

Statutes

California Labor Code, Sec. 218 .....13, 16, 17

Labor Management Relations Act of 1947, 61 Stat. 152, Title II, Sec. 201 8

Labor Management Relations Act of 1947, 61 Stat. 153, Title II, Sec. 203 8

United States Code, Title 9, Sec. 2 2

United States Code, Title 29, Sec. 171(c) 8

United States Code, Title 29, Sec. 173(d) 8

United States Code, Title 29, Sec. 207(a)(1) 16

United States Code, Title 46, Sec. 596 .....15, 16

United States Code, Title 46, Sec. 597 15

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1086

LOS ANGELES NEWSPAPER GUILD, LOCAL 69, AMERICAN NEWSPAPER GUILD, AFL-CIO, CLC, *et al.*,

Petitioner,

vs.

THE HEARST CORPORATION and its Divisions, LOS ANGELES HERALD-EXAMINER and HILLBRO NEWSPAPER PRINTING COMPANY,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondent The Hearst Corporation hereby opposes the Petition for a Writ of Certiorari filed by Petitioner Los Angeles Newspaper Guild, *et al.*, and respectfully urges that it be denied.

Opinions Below.

The opinion of the Court of Appeals, reported at 504 F.2d 636, 642-643, is set forth in Appendix A to the Petition; the opinion and order of the district court, reported at 352 F.Supp. 1382, is set forth in Appendix B to the Petition.

Questions Presented.

Petitioners, Los Angeles Newspaper Guild, Local 69, American Newspaper Guild, AFL-CIO, CLC; *et al.* (hereinafter referred to as "the Guild"), have presented five questions for review. The Hearst Corporation (hereinafter referred to as "Hearst"), contends that those five questions can be reduced to two questions, which are as follows:

1. Did the particular arbitration provisions contained in the collective bargaining agreement (hereinafter referred to as "the agreement"), provide the exclusive remedy available to the Guild?

2. Does the exclusivity of said arbitral remedy contravene any recognizable public policy?

Counterstatement of the Case.

There exists no substantial dispute as to the material facts here involved. The Complaint in the instant case sought recovery of certain retirement and severance pay benefits provided for in collective bargaining agreements between the parties. However, the collective bargaining agreements between the parties provided for final and binding arbitration of all grievances arising thereunder and allowed the parties to proceed to arbitration by the mutual selection of an arbitrator ("bilateral arbitration") or, if either party failed to cooperate, by the unilateral appointment of an arbitrator ("ex parte arbitration"). The relevant portions of the arbitration provisions are found in Sections 3A, 3B, and 3E of Article VII, which state:

"A. Within five (5) days of the written notice of arbitration hereinbefore prescribed, the parties shall meet to select an arbitrator to whom the grievance of the complaining party shall be submitted for final decision.

"B. If such an arbitrator is not selected, or the party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator, or if for any other reason an arbitrator is not selected or secured within the aforesaid five (5) day period, then the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator pursuant to the present rules of the voluntary labor arbitration tribunal of the American Arbitration Association, and the grievance shall be submitted to such arbitrator for final decision.

* * *

"E. The award of the arbitrator shall be final and binding."

The district court dismissed the subject complaint on the ground that arbitration was the exclusive remedy of Guild and the Court of Appeals affirmed.

As Guild maintains it has the right to arbitrate the subject dispute, the following facts are without controversy and there appears to be no disagreement that (1) the arbitration provisions referred to in part above remain in force and effect, (2) an award made in the arbitration is final and binding, and (3) the arbitration provisions encompass the subject claims.

Introduction.

This case presents a rather routine question to this Court: Does the presence of arbitration as an exclusive remedy preclude Guild from seeking judicial relief to determine the merits of a claim arising under a collective bargaining agreement? Hearst submits that this question can be easily answered by the observation that countless courts, including the District Court and the Court of Appeals below, have determined that a union, having chosen arbitration as a forum to settle disputes, is bound by that choice. As such, the present Petition for a Writ of Certiorari should be denied on the basis that this case does not offer a question of any public significance, nor does it face this Court with a conflict among the Courts of Appeals which this Court need resolve.

An analysis of the arguments set forth in the Guild's Petition for Certiorari must begin with a statement of the ultimate operative facts here involved. First, the provisions of the contract between the parties so far as it provides for the arbitration of grievances is still in force and effect. The facts and circumstances involved in the subject dispute between the parties give rise to a substantively arbitrable grievance. The arbitration provisions in the contract, whether invoked bilaterally or unilaterally, always result in a decision that is final and binding on the parties. These three facts were found to exist by the courts below and have never been controverted by the Guild. The recitation of these facts, with a concomitant allusion to the familiar *Tril-*

ogy cases,[1] is all that is necessary to command the usual result that arbitration is the exclusive legal recourse available to the petitioners.

Petitioners seek to avoid this typical result by claiming that Hearst has "repudiated" the arbitration provisions of the agreement. Because of this assertion, it is necessary to consider three more ultimate operative facts which are dispositive of the Guild's claim. First, the arbitration provisions here involved specifically empower either party to proceed *ex parte* to final and binding arbitration if it is confronted with an adverse party's refusal to proceed on a bilateral basis to arbitration. Second, the Guild acknowledges that it proceeded to submit the subject dispute to final and binding arbitration by invoking the *ex parte* arbitration provisions set forth in the contract, thereby tacitly recognizing Hearst's inability to frustrate the arbitration provisions. Third, no allegation has been made at any point in the subject proceedings that the Guild, as a representative of present and past employees of Hearst or the successors of such employees, has breached its duty of fair representation. As the Guild has not been charged with breach of its duty of fair representation, the employees may not bring direct action against Hearst to resolve a dispute subject to the arbitration provisions of the agreement.

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[1] *United Steelworkers of America v. American Manufg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed. 1403 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1358, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

The Ex Parte Arbitration Provided for in the Collective Bargaining Agreement Is and Was the Exclusive Remedy for Guild.

Guild contends that the arbitral process was not the exclusive remedy afforded to it under the agreement because Hearst purportedly repudiated the agreement. For its decisional authority to support its contention, Guild relies upon *Vaca v. Sipes,* 386 U.S 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) and several federal courts of appeals decisions.

Guild's contentions notwithstanding, Hearst could not have "repudiated" the particular arbitration provisions here involved. Repudiation, as defined in Black's Law Dictionary, (4th Ed. Revised), is "the rejection or refusal of . . . a duty or relation". Repudiation, then, manifests a prospective unwillingness to perform a duty or obligation arising from a contract. While repudiation may be conceptionally elusive, repudiation of an arbitration provision may be viewed as conduct by one party which frustrates or precludes access by the other party to the arbitral forum. Because of the particular provisions here involved, Hearst could not and, in fact, did not prevent Guild from obtaining a resolution of its grievances by arbitration.

The gravamen of Guild's assertions is that Hearst failed to meet with Guild to select an arbitrator under the procedures set forth in Section 3A. Guild proceeds rapidly from this assertion to the conclusion that Hearst thereby repudiated all of the arbitration provisions, neglecting to mention the *ex parte* provisions set forth in Section 3B.

In their agreement, the parties specifically envisioned the possibility that one of them might assert the non-

arbitrability of a particular grievance and, to protect that position, decline to cooperate in the selection of an arbitrator. In order to avoid suits to compel arbitration, the parties wisely provided an accommodation to such a position by permitting the selection of an arbitrator unilaterally without requiring a determination of arbitrability prior to the arbitration itself. This provision is embodied in Section 3B which in pertinent part is worthy of repetition:

> "B. If such an arbitrator is not selected, or the party adverse to the complaining party refuses for any reason to proceed to the selection of an arbitrator . . . then the complaining party has the right to request the American Arbitration Association to proceed to the appointment of an arbitrator . . . and the grievance shall be submitted to such arbitrator for final decision."

It is apparent that Section 3B provides for *ex parte participation* in the selection of an arbitrator who thereupon would make a final and binding decision. Therefore, Hearst could not have, under any circumstances nor in any way imaginable, repudiated the *ex parte* access to arbitration. It is emphasized that Sections 3A and 3B specifically provided that the decision of the arbitrator was to be final. Even more, Section 3E of Article VII of the Agreement provides that the arbitrator's award was to be *final and binding.* Thus, Guild's argument that Hearst would not be bound by the award of the arbitrator selected under Section 3B is specifically contradicted by the language of the Agreement itself. Parenthetically, it is observed that due process considerations are not involved herein since Hearst had prior notice of the actual hearing.

To reiterate, Section 3B permitted Guild to seek and obtain the appointment of an arbitrator despite any verbal or written protestations of Hearst. In fact, Guild did so obtain the appointment of an arbitrator under Section 3B, who rendered a final and binding decision after which this action was commenced by Guild.

The practice of submitting grievances to arbitration has been specifically approved for labor disputes by the Congress of the United States. Labor Management Relations Act of 1947, 61 Stat. 152, Title II, § 201, 29 U.S.C. § 171(C). Later, in the same Act, 61 Stat. 153, Title II, § 203, 29 U.S.C. § 173(d), the Congress stated in relevant part:

> "(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

The Congressional policy enunciated above has found wholehearted support from this court in the *Trilogy* cases[2] and more recently in *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974).

Even more, once the parties have determined that arbitration will be the exclusive forum for resolution of grievances, the parties are bound by their choice. This is reflective of the federal labor policy which requires that contract grievance procedures agreed upon by employers and unions be the exclusive forum for resolution of industrial grievance disputes. Access to state and federal courts to enforce rights arising under a col-

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[2] *Id.*

lective bargaining agreement arises only in exceptional cases. Generally, suits are permitted only to compel arbitration.

One such exception is found in *Vaca v. Sipes, supra,* which Guild cites for a general proposition that Guild was permitted to pursue an elective remedy of enforcing its members' rights in court rather than in the arbitral forum. Guild mistakes this court's holding in *Vaca,* the basic facts which are crucial to understanding that *Vaca* is not applicable in the instant matter.

First, the collective bargaining agreement in *Vaca* called for bilateral arbitration which meant that either the union or the employer could repudiate the arbitration provisions. Such repudiation could occur because either party could deny the other party access to arbitration. As discussed above, no repudiation could occur herein because Guild always had access to arbitration under Section 3B. Second, the union in *Vaca* wrongfully refused to process the employee's grievance to its end result in arbitration which this court found to be a breach of its duty of fair representation. 386 U.S. at page 197. Here, of course, Guild has pursued possible remedies in various arenas: administrative, court and arbitral. The breach of the union's duty of fair representation found by this court in *Vaca* is simply not alleged herein.

Guild also cites several cases for the proposition that it was not restricted to the arbitral forum for a resolution of the dispute herein, but rather had the alternative remedy of court action to determine the substantive merits of the dispute. It is noted that in none of the cases cited by Guild involved a contract provision which provided for *ex parte* access to arbitration, rather

each contract involved only bilateral access to arbitration.

In *Southwestern Electric Power Company v. Local Union 738, IBEW*, 293 F.2d 929 (5th Cir. 1961), the employer refused to submit to arbitration under an agreement requiring bilateral participation in the arbitral process. The court compelled arbitration so that the merits of the dispute could be heard.

In both *International Association of Machinists v. Hayes Corp.*, 296 F.2d 238 (5th Cir. 1961) and in *United Steelworkers of America AFL-CIO v. American Intl. Aluminum Co.*, 334 F.2d 147 (5th Cir. 1964), the employer refused to submit to any of the grievance steps or arbitration. In both cases, although involving different factual circumstances, the court compelled arbitration to determine the merits of the dispute.

In *Teamsters Local Union v. Braswell*, 392 F.2d 1, opinion modified 395 F.2d 655 (5th Cir. 1968), the union sought arbitration and obtained an arbitration award despite a special appearance by the employer denying the substantive arbitrability of the dispute. In the modified opinion, the court held that arbitration was the correct remedy even though the union had not exhausted the preliminary grievance procedures under the agreement.

In the last two cases cited by Guild, *Lane, Ltd. v. Larus & Brother Company*, 243 F.2d 364 (2d Cir. 1957) and *Reiss v. Murchison*, 384 F.2d 727 (9th Cir. 1967), the courts were not faced with an employer-union dispute but rather a commercial contract. In both cases, one party had refused to submit to arbitration questions which the courts held could be arbitrated under the contract. The court did not determine

the merits of the dispute but rather compelled arbitration.

It is clear that the cases cited by Guild are not apposite to the instant matter where Guild always had ex parte access to arbitration.

The United States Congress has also indicated its approval of arbitration in the commercial arena by the enactment of Title 9 of the United States Code which is entitled "Arbitration". Section 2 of the Arbitration Act states that the Act applies to situations involving a written arbitration provision in a contract evidencing a transaction involving commerce. Section 4 of the Arbitration Act permits a party aggrieved by the alleged failure, neglect or refusal of another party to arbitrate under a written agreement to petition any United States District Court for an order directing that such arbitration proceed in the manner provided for in the agreement. Although Title 9 is not specifically applicable to labor disputes (rather being supplied for a need in commercial disputes), the principles arising from an examination of cases thereunder are applicable herein. More specifically, ex parte provisions similar to the ex parte provision considered herein have been upheld in cases decided under the Arbitration Act.

In *Kentucky River Mills v. Jackson*, 206 F.2d 111 (Sixth Cir. 1953), cert. denied 346 U.S. 887, 74 S.Ct. 144, 98 L.Ed. 392, the arbitration agreement provided that if either party failed to appoint an arbitrator within seven days after receipt of the other party's nomination of an arbitrator, the arbitrator already nominated could act as sole arbitrator. Kentucky River Mills, one of the parties, refused to recognize any obligation under the contract of arbitration and further refused to

appoint an arbitrator. The appointed arbitrator conducted an ex parte hearing with notice to the recalcitrant Kentucky River Mills, and his determination against Kentucky River Mills was upheld by the Sixth Circuit Court of Appeals.

The facts herein are even stronger because only one arbitrator was to be chosen by the terms of the agreement, and the arbitrator's decision was to be final and binding, whether evolving from a bilateral or *ex parte* selection of an arbitrator. See *Standard Magnesium Corporation v. Fuchs,* 251 F.2d 455, 458 (Tenth Cir. 1957) (where the court held that in situations where an ex parte clause is involved, no court order was necessary under Section 4 of the Arbitration Act since the party could proceed on its own to arbitration).

In *A/S Ganger Rolf v. Zeeland Transportation Co.,* 191 F.Supp. 359, 363 (S.D.N.Y. 1961) the court stated:

> "Petitioners, while conceding that they have the right under the arbitration clause to proceed ex parte, urge that they have no duty to do so and that therefore they may waive the right and elect to petition the court for relief under the Arbitration Act. The petitioners overlook the object of the Arbitration Act which contemplates only the enforcement of the arbitration agreement made by the parties themselves in the manner they themselves provide. Petitioners, by waiving rights and remedies given to them by the arbitration clause cannot thereby acquire a new right not granted by the Act to have the court compel arbitration in a manner different from that provided by the

clause. *Having designed their own remedy for recalcitrance they cannot, over respondent's objection, ignore that remedy and pursue another.*" (Emphasis added.)

California adheres to the same rule enunciated above. *Brink v. Allegro Builders, Inc.*, 58 Cal.2d 577 (1962); *Smith v. Campbell & Facciolla, Inc.*, 202 Cal.App.2d 134 (1962); *Eckert v. Davis*, 161 Cal.App.2d 638 (1958).

Here, the situation is identical in that the contract provided for *ex parte* access to arbitration despite Hearst's alleged protestations. The conclusion to be drawn, therefore, from the foregoing is that when the parties choose the arbitral forum to settle their disputes, and even more, choose to permit one party to obtain an arbitrator's determination in an *ex parte* manner, the parties are bound by their choice. This is especially true in the labor arena where arbitration is the preferred alternative for resolution of labor disputes, be they large or small.

Guild asserts that California Labor Code § 218[3] always permitted Guild to sue in a judicial forum on behalf of its members to enforce their claims despite the exclusivity of the arbitration provisions set forth above. Guild mistakes the thrust of California Labor Code § 218 which does not preclude an employee or his union from utilizing the grievance arbitration forum

[3]California Labor Code § 218 provides: "Nothing in this article shall limit the authority of the district attorney of any county or prosecuting attorney of any city to prosecute actions, either civil or criminal, for violations of this article or to enforce the provisions thereof independently and without specific directions of the division. Nothing in this article shall limit the right of any wage claimant to sue directly or through an assigneee for any wages or penalty due him under this article."

to adjudicate those rights. In fact, the Guild and thereby its members did agree to resolve any compensation disputes in the arbitral forum rather than in a judicial forum. Since the arbitral forum is the preferred forum according to both the Congress and the federal courts, such an election of forums bars the employees in this matter from seeking judicial relief on the merits of their claims.

Guild relies upon *United States Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971) as authority to bolster the proposition that it was entitled under California Labor Code § 218 to elect between the arbitral and judicial forums to enforce its members' asserted rights. In *Arguelles,* this court permitted a seaman to sue in court for wages under Title 46 U.S.C. §§ 596 and 597, despite the presence of a grievance arbitration procedure established by virtue of a contract between the seaman's Maritime Union and the employer. However, a close and exact reading of *Arguelles* reveals that the court was allowing an exception to the holding in the *Steelworkers Trilogy,* only in view of the fact that seamen had been thusly protected for 180 years. The court then stated:

> "The chronology of the two statutes—§596 and §301—makes clear that the judicial remedy was made explicit in §596 and not clearly taken away by §301. What Congress has plainly granted we hesitate to deny. Since the history of §301 is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them. We would require much more to hold that §301 reflects a philosophy of legal compulsion that overrides the explicit judicial remedy provided by 46 U.S.C. § 596." 400 U.S. 357-358.

The court, in essence, was attempting to reconcile two different federal statutes and found that implicit repeal of §§ 596-597[4] was not intended by the Congress.

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[4]46 U.S.C. § 596 provides:

"TIME FOR PAYMENT. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4529; Dec. 21, 1898, c.28, §§ 4, 26, 30 Stat. 756, 764; Mar. 4, 1915, c.153, § 3, Stat. 1164."

46 U.S.C. § 597 provides:

"PAYMENT AT PORTS. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: Provided, Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be

(This footnote is continued on next page)

It is worthwhile noting again that California Labor Code § 218 implicitly permits the employee to select a different forum than a judicial forum to settle his claim while § 596 does not. Even more, § 218 is a state statute while the Labor Management Relations Act is federal legislation. The familiar doctrine of preemption gainsays the contention of the Guild that § 218 is coequal with federal law. To allow a state or states to enact legislation permitting employees to avoid exclusive remedy grievance-arbitration procedures would substantially undercut the congressionally declared national policy favoring such procedures.

The other case relied upon by the Guild can be similarly analyzed. In *Iowa Beef Packers, Inc. v. Thompson,* 185 N.W.2d 738 (Iowa 1971) cert. granted 404 U.S. 820, 92 S.Ct. 79, 30 L.Ed.2d 48 (1971), dismissed as improvidently granted 405 U.S. 228, 92 S.Ct. 859, 31 L.Ed.2d 165 (1972), the Iowa Supreme Court allowed an employee to maintain an action for overtime wages. The action was brought under the detailed and specific Fair Labor Standards Act, 29 U.S.C. § 207(a)(1). The Iowa Supreme Court stated:

> "We believe that if Congressional intent to allow a seaman to arbitrate or sue at his option is

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then due him, as provided in section 596 of this title: Provided further, That notwithstanding any release signed by any seaman under section 644 of this title any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: And provided further, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4530; Dec. 21, 1898, c.28, §§ 5, 26, 30 Stat. 756, 764; Mar. 4, 1915, c.153, § 4, 38 Stat. 1165; June 5, 1920, c.250, § 31, 41 Stat. 1006."

> manifest in the seaman's act involved in Arguelles, as the court held here, then an intent to give workmen such an option is also manifest in the Fair Labor Standards Act. 185 N.W.2d 738, 742."

Again, the court was attempting to reconcile two federal statutes. It decided that implicit repeal of the Fair Labor Standards Act was not intended by Congress. Such is not the situation in the present case where California Labor Code § 218 is a state statute which must bow to the federal policy favoring arbitration.

Concluding, the *Arguelles* rationale is not applicable here for two reasons: (1) California Labor Code § 218 is preempted by federal law and (2) California Labor Code § 218 implicitly permits an employee to transfer his right to sue in a court of law to the arbitral forum.

Guild urges that Hearst by its repudiation of the agreement was estopped from asserting that Guild's exclusive remedy was arbitration. As discussed amply above, Hearst could not have repudiated the arbitral process since Guild at all times had the contractual right to proceed *ex parte* to arbitration. Therefore, the doctrine of estoppel is inapposite to the facts of this case since Hearst never could have prejudiced Guild's remedy of seeking *ex parte* arbitration.

Concluding, the *ex parte* arbitration provision contained within the agreement was the exclusive remedy available to Guild in this matter.

There Is No Public Policy Which Requires That the Ex Parte Provision in the Agreement Be Declared Invalid.

Guild asserts that the benefits claimed by its members are potentially valuable property rights which as a matter of public policy should be protected. The correctness of this assertion is irrelevant as the instant case does not involve a review of the merits of this dispute. The relevant fact is that Guild, on behalf of its members, agreed to submit all disputes concerning those benefits to the arbitral forum. Guild might well have placed into the agreement the option of either judicial or arbitral remedies to enforce any claims to those benefits but did not, choosing rather the exclusive remedy of arbitration. As the *Trilogy* cases[5] state, such a choice is preferred as a matter of federal labor policy.

Guild states that plaintiffs should always have their claims adjudicated on the merits. What the Guild overlooks, however, is that Statutes of Limitations have existed for centuries on sundry causes of action. In situations where a statute of limitations is invoked, obviously the plaintiff is barred from having his claim heard on the merits.[6] A competing public policy is also operative here, *i.e.*, that it is in the public interest to have claims heard and settled within a reasonable time, especially in the labor arena. That policy is the foundation for enacting statutes of limitation.

Furthermore, a decision allowing the Guild to avoid the time limits explicitly or inherently in a collective

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[5]Cases cited in footnote 1.

[6]While relying on *Vaca v. Sipes, supra,* Guild seems to overlook that the result in the case was that the plaintiff was barred from recovering because he failed to pursue the proper defendant until apparently the statute of limitations had expired.

bargaining agreement would encourage unions and employers to delay initiating grievance procedures so that a court of law could hear the merits of the dispute. Such a result would be directly contrary to the national labor policy of favoring grievance-arbitration procedures for settling such disputes.

Conclusion.

In conclusion, Hearst submits that the present Petition for a Writ of Certiorari be denied on the basis that Guild's exclusive remedy herein was the arbitral forum and not the judicial forum for a determination of the merits of the parties' dispute. Further, there is no recognizable compelling public policy which mandates that this exclusive remedy be vacated so as to permit Guild to avoid its contractual remedy of arbitration.

March 27, 1975.

Respectfully submitted,

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